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NO. 21311

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

3492

v. 3492

UNITED STATES OF AMERICA

Appellee and Petitioner,

vs.

CORNELIUS LOCKHART,

Appellant and Respondent.

FEB 26 1969

*See Vol.
3423*

PETITION FOR REHEARING

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
DARRELL W. MacINTYRE,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

688-2434; 688-2397.

Attorneys for Appellee and
Petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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vs.

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PETITION FOR REHEARING

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1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

688-2434; 688-2397

Attorneys for Appellee and
Petitioner

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee and Petitioner,

vs.

CORNELIUS LOCKHART,

Appellant and Respondent.

PETITION FOR REHEARING

TO THE HONORABLE JUDGES: BROWNING AND ELY OF THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIR-
CUIT AND FOLEY OF THE DISTRICT OF NEVADA, SITTING
BY DESIGNATION.

Pursuant to Rule 35 of this Court, appellee, United States
of America, respectfully petitions this Court for rehearing in the
above-captioned cause, and suggests a rehearing en banc. This
suggestion for a rehearing en banc is made with the approval of the
Solicitor General of the United States.

The opinion and decision of this Court was filed on October
23, 1968, and this petition is filed within the time provided therefor
by provision of the Court's Rule 40.

BY ALLOWING A REGISTRANT TO ATTACK HIS CLASSIFICATION DESPITE THE FACT THAT HE HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES, THIS COURT HAS IGNORED AN UNBROKEN LINE OF ITS DECISIONS AND CREATED A SERIOUS THREAT TO THE SELECTIVE SERVICE SYSTEM.

The District Court in this case refused to consider Lockhart's defense that the denial by the local board of his claim for classification as a conscientious objector was without any basis in fact on the ground that all of appellant's contentions were foreclosed by his failure to exhaust his administrative remedies [P. 2 Slip Opinion].

This Court, in reversing the District Court, held: "The failure to exhaust administrative appellate remedies is not always a bar to asserting as a defense to criminal prosecution, for refusal to submit to induction, that there was no basis in fact for the denial of a claimed conscientious objector classification." [P. 3, Slip Opinion].

The Government respectfully submits that this Court, in reversing the District Court, overlooked an unbroken line of decisions of this Court holding that exhaustion of administrative remedies is a prerequisite to judicial review of an administrative order.

This rule, as stated most recently by this Court in Yeater v. United States, ___ F.2d ___ (9th Cir. June 27, 1968), is:

"Appellant did not appeal any of his I-A (available for military service) classifications through the appellate review channels of the

Selective Service System. He is therefore precluded from claiming as a defense to a criminal prosecution that there was no basis in fact for the classification. "

Accord, Edwards v. United States, 395 F.2d 453

(9th Cir. 1968), petition for cert. filed

37 U.S. L.W. 3049 (U.S. July 30, 1968);

Woo v. United States, 350 F.2d 992 (9th Cir. 1965);

Greiff v. United States, 348 F.2d 914

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(9th Cir. 1958), cert. denied 359 U.S. 907

(1959);

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(9th Cir. 1956);

Skinner v. United States, 215 F.2d 767

(9th Cir. 1954), cert. denied 348 U.S. 981
(1955);

Rowland v. United States, 207 F.2d 621

(9th Cir. 1953);

Williams v. United States, 203 F.2d 85

(9th Cir. 1953), cert. denied 345 U.S. 1003
(1953).

In support of their view that the Lockhart case presented "exceptional circumstances" which called for a relaxation of the rule, the majority relies upon Donato v. United States, 302 F.2d 469, 470 (9th Cir. 1962), cert. denied 374 U.S. 828 (1963) and Wills v. United States, 384 F.2d 943 (9th Cir. 1967), cert. denied ____ U.S. ____ (1968).

In Donato the registrant testified that he had every intention of appealing within the prescribed period, but that his failure to do so was due to the fact that he had been summoned to firefighting duty and that when he returned from his firefighting mission the appeal period had expired. In reversing and remanding this case, this Circuit held that in the particular circumstances of this case, a relaxation of the exhaustion of remedies rule would be just and proper.

In the Wills case the local board had declared Wills a delinquent and had thereafter proceeded to reclassify him to class I-A. However, contrary to a specific requirement of the Selective Service Regulations, the local draft board did not mail Wills his

notice of delinquency until long after the expiration of the ten day period for appeal from his subsequent reclassification. This Circuit, in holding that Wills was not precluded from attacking his classification because of a failure to appeal, decided that Wills could not justly be held to the consequences of his failure to appeal, since during the appeal period he was not in possession of the specific, relevant facts which the local board was required by the Regulations to supply to him prior to the reclassification.

It is apparent that the principles applied in Donato and Wills are inapplicable to the present case. Title 32, Code of Federal Regulations, Section 1624.1(a) provides:

"Every registrant, after his classification is determined by the local board except a classification which is itself determined upon an appearance before the local board under the provisions of this part, shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended. "

[Emphasis added].

This appellate procedure is explained on the classification notice and can be further elucidated by local-board personnel.

The record in this case discloses that Lockhart was a high

school graduate who had attended college [p. 7]. ^{1/} He was notified twice by the local board of his I-A classification (SSS Form No. 110) and, also in writing and at the same time, that he had the right to appeal the board's decision provided he took his appeal within a specified time [pp. 3, 11]. Lockhart made no effort to appeal this classification. There is no evidence that Lockhart was unfamiliar with this procedure or was incapable of understanding it. On the contrary, the fact that he requested a Special Form for Conscientious Objectors (SSS 150) on March 9, 1965, and filed same on March 10, 1965 indicates his awareness of Selective Service procedures [pp. 12, 13-16]. Yet, after being classified I-A twice, he failed to appeal and was ordered to report for induction [pp. 11, 19]. By this time he had waived his administrative remedies.

There is no evidence in the record from which this Court could conclude that Lockhart's right to appeal was interfered with or that he was not advised and did not know of the consequence of his failure to appeal. Clearly the facts of this case do not present exceptional circumstances whereby a relaxation of the rule would be just and proper.

The urgent necessity of the granting of a rehearing en banc in the instant appeal is indicated by Judge Ely in his dissenting opinion wherein he stated: "It is to be hoped that the majority opinion in the present case will maintain only the briefest survival, for if not, the district courts will be overwhelmed with litigation involving

^{1/} Refers to pages of appellant's Selective Service File, Government's Exhibit No. 1.

problems whose solution should initially and properly fall within the responsibility of the agency created for the purpose. Moreover, the majority opinion opens, quite widely, a door leading to impairment of the nation's highest interest, the security of its people." [P. 18, Slip Opinion].

CONCLUSION

For the foregoing reasons, therefore, the Government respectfully urges this Court to reconsider its decision and adhere to the position which it has consistently adopted in the past.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

DARRELL W. MacINTYRE,
Assistant U. S. Attorney,

Attorneys for Appellee and
Petitioner.

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No. 21,312

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MAIER BREWING COMPANY, a corporation, and
RALPHS GROCERY COMPANY, a corporation,

Appellants,

VS.

THE FLEISCHMANN DISTILLING CORPORATION, a
corporation, and JAMES BUCHANAN & COM-
PANY LIMITED,

Appellees.

**APPELLANTS' PETITION FOR A REHEARING
AND REQUEST FOR A HEARING IN BANC**

J. ALBERT HUTCHINSON,

55 New Montgomery Street,

San Francisco, California 94105,

*Attorney for Appellants
and Petitioners.*

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The proposed opinion disregards adjudicated and admitted facts and uncontradicted, credible evidence	1
The proposed opinion would adopt a novel doctrine, as applied to the undisputed record, in conflict with <i>prior</i> rulings of the court and contrary to the act of the Congress ..	3
In view of the declination of the proposed opinion and decision to follow clear, uniform, well considered and contemporaneous rulings of the court, a hearing in banc, upon rehearing, should be granted herein	5

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No. 21,312

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Appellees.

**APPELLANTS' PETITION FOR A REHEARING
AND REQUEST FOR A HEARING IN BANC**

INTRODUCTION AND REFERENCES

Appellants are in receipt of the proposed opinion of the Court in this cause and respectfully petition for a rehearing and for a hearing *in banc* upon the rehearing herein sought. References herein are as set forth in appellants' briefs, to appellees' brief as RB, and, to the proposed opinion, as paginated in the official advance opinion. Unless otherwise indicated, emphasis, insertions and omissions in quotations herein are supplied by counsel.

THE PROPOSED OPINION DISREGARDS ADJUDICATED AND ADMITTED FACTS AND UNCONTRADICTED, CREDIBLE EVIDENCE.

The proposed opinion (pp. 4-5 and 7-9) disregards the fact the District Court had made and there remained on file findings favorable to appellant-defendants upon every factual issue essential to a monetary recovery by either of plaintiff-appellees herein, in favor of appellant-defendants and against plaintiff-appellees and these issues have never been re-tried in any manner or in any respect. These adjudicated facts are set forth in volume I, pages 1-196, in proceeding 17698 and the present record and relevant excerpts from that and the instant records are set forth in the appendix hereto, Parts I-II, for convenience.

Since the subsisting findings were not set aside (by the Court in 314 F.2d 159, or by the District Court, appendix Part III), no trial of the remanded issue of "plaintiffs' right to an accounting" was ever had or attempted and appellants' objections to proceeding without a trial of such issue were timely and properly reserved, it is apparent that the proposed opinion considers a moot, i.e., premature, case in which no trial of the essential, remanded issue was ever had.

It has been expressly conceded, at all times, that appellees suffered no damages, nor any economic or monetary

injury, by any infringement of appellee Buchanan's mark, and, presumably, the District Court would follow

Highway Cruisers of California, Inc. v. Security Industries, Inc., 374 F.2d 875, 876,

to award nominal damages, and to thereafter examine such evidence as should be advanced by the parties to inform its discretion and support its finding and judgment whether "plaintiff[s'] loss . . . if any, would be fairly measured by defendant[s'] profits [or] be revealed by an accounting".

Assuming that the remanded issue of "plaintiffs' right to an accounting" could be considered as having been tried in some atypical and undisclosed manner, the proposed opinion (pages 8 and 10) disregards appellants' evidence of costs of manufacturing and selling the beer in suit, in accepting the unsupported and clearly erroneous finding of the District Court in, in turn, accepting appellees' impermissible¹ "add-backs" of admitted costs of each of appellants lawfully chargeable to their claimed "net profits" (see appendix Part IV and citation and quotation of record at pages 19-23 and 59-63 of appellants' opening brief and pages 31-33 of their closing brief).

It should be recalled that appellees' counsel, in oral agreement and in response to a direct question of the Court, expressly conceded that the "add-backs" of appellees' accountants were "legitimate expenses of conducting business" of appellants.

Since such unsupported "add-backs" aggregate \$2,254,-669 and clearly *reduce* appellants' assumed "net profits" to the total aggregate of only \$13,853.27, this judgment for the recovery of the sum of \$63,761 should not be affirmed, in any event.

¹Such "add-backs" are "not . . . in accordance with correct accounting principles" (*Efron v. Kalmanovitz*, 249 A.C.A. 209, 219, 57 Cal. Rptr. 248, March 6, 1967).

**THE PROPOSED OPINION WOULD ADOPT A NOVEL DOCTRINE,
AS APPLIED TO THE UNDISPUTED RECORD, IN CONFLICT
WITH PRIOR RULINGS OF THE COURT AND CONTRARY TO
THE ACT OF THE CONGRESS.**

As candidly noted in the proposed opinion (pages 5-10), the proposed decision is to be bottomed upon the ruling and dicta in *Monsanto Chemical Co. v. Perfect Fit Products Manufacturing Co.*, 349 F.2d 389—which had no influence upon the “accounting” hearing herein² and was only advanced at submission below, *after* the ruling of the Court upon the issues of attorneys’ fees (359 F.2d 156, subsequently affirmed in 386 U.S. 714)—considered as a “trend” of decision in support of the ruling that establishment of a case for an injunction to prevent “likelihood of confusion” in the future *automatically* establishes “plaintiffs’ right to an accounting” in *every* case.

The *Monsanto* factual situation (as forthrightly noted in the specially concurring and dissenting opinion (349 F. 2d 389, 397-398)) would support a recovery of damages in any court in any jurisdiction in this country (compare *Dairy Queen, Inc. v. Wood*, 369 U.S. 469). Herein, it is expressly conceded that appellees suffered no damages, nor any economic injury save “out of pocket expenses in prosecuting this action” already adjudicated against them (386 U.S. 714).

Further, the *Monsanto* court (349 F.2d 389 at 392-393) notes only precedent (or dicta) in the Third and Tenth, and by its ruling, the Second circuits, in support of its decision. This record is too thin to justify acceptance of

²Although “tried” months earlier, *Monsanto* was decided, hence cited, only at the time of submission and while the issue of recovery of attorneys’ fees was in suspense. The almost identical amounts of the vacated award of attorneys’ fees and upon the instant “accounting” should not escape notice and it should be further noted that the *Monsanto* court (349 F.2d 389, 396, footnote 10) consciously based its ruling on “out of pocket expenses in *prosecuting* this action—which, herein, are excluded from consideration as a matter of *res judicata* (386 U.S. 714).

a minority rule, or application of a one-case trend, if trend it be. The *Monsanto* facts were compulsive—whereas, herein, a recovery by these appellees would be a wind-fall, at the minimum, and, on this record, purely punitive.

Moreover, the proposed opinion does not announce a rule of law, but would declare that an unguided, unqualified and unrestrained ruling of the trial court is not reviewable by any declared standard or measure whatever. It is only law school doggerel that “the rule in equity is the length of the chancellor’s foot”. *Highway Cruisers* (supra, 374 F.2d 875, proposed opinion, pages 4, 9) concerned only elements more favorable to the trademark plaintiff than this record and the fact that that trial court held an accounting insupportable, whereas this trial court held contra—in the absence of any positive, or supporting element whatever. It is respectfully submitted that the proposed ruling and the ruling in *Highway Cruisers* cannot be reconciled, hence both cannot be considered as stating the rule of decision of this circuit. Irreconcilable trial court rulings should not be open to affirmance and some standard for guidance in future rulings of the District Courts of the Circuit should be announced in the public interest.

Since it is not suggested that appellees have suffered any compensable injuries from any conduct of either of appellants, the wind-fall to appellees forecast by the instant judgment is exclusively punitive (proposed opinion, pages 8-10)—hence clearly violative of the statutory command that the *recovery* of “defendant’s profits . . . shall constitute compensation and not a penalty” (15 U.S.C. 1117, emphasis in concluding sentence).

Compare

Leh v. General Petroleum Corp., 330 F.2d 288
(reversed as to another point in 382 U.S. 54).

The latter limitation of the Congress upon such recoveries should be accepted as binding in a purely statutory proceeding (386 U.S. 717).

IN VIEW OF THE DECLINATION OF THE PROPOSED OPINION AND DECISION TO FOLLOW CLEAR, UNIFORM, WELL CONSIDERED AND CONTEMPORANEOUS RULINGS OF THE COURT, A HEARING IN BANC, UPON REHEARING, SHOULD BE GRANTED HEREIN.

Appellants respectfully submit that the proposed opinion announces a position in advance of any decision or comment in any case cited therein, or cited elsewhere, and is irreconcilable with the rulings of the Court in indistinguishable decisions reported for the Circuit, most recently in

Highway Cruisers of California, Inc. v. Security Industries, Inc. (supra, 374 F.2d 875, 876);

Plough, Inc. v. Kreis Laboratories, 314 F.2d 635, 639-641;

Sleeper Lounge Co. v. Bell Manufacturing Co., 253 F.2d 720, 723-724;

and cases cited.

Appellants further so submit that, if the precedents last above cited are proposed to be over-ruled (pages 4-9) and to be over-ruled in disregard of statute, the cause deserves the consideration of the Court *in banc* in order that the District Courts of the Circuit shall have been afforded an authoritative ruling in trademark cases to arise in the future—as well as insuring a final ruling upon the issues of this cause as among these litigants.

Dated, San Francisco, California,
March 18, 1968.

Respectfully submitted,

J. ALBERT HUTCHINSON,
*Attorney for Appellants
and Petitioners.*

CERTIFICATE OF COUNSEL

I hereby certify that I have read the foregoing Petition for Rehearing and that said Petition in my judgment is well founded and not interposed for the purpose of delay.

J. ALBERT HUTCHINSON,
*Attorney for Appellants
and Petitioners.*

(Appendix Follows)

Appendix

Appendix

PART I:

THE TRIAL COURT FINDINGS REMAINING IN EFFECT UPON
REMAND IN FIRST APPEAL (314 F.2d 149) ARE, IN RELE-
VANT PART AS FOLLOWS:

“Findings of Fact

* * *

“3. Defendant, Maier Brewing Company, is a corporation duly organized and existing under the laws of the State of California, is a citizen and resident thereof, and is hereinafter referred to as ‘Maier.’

“4. Defendant, Ralphs Grocery Company, is a corporation duly organized and existing under the laws of the State of California, is a citizen and resident thereof, and is hereinafter referred to as ‘Ralphs.’

* * *

“11. Defendant Maier brews and sells beer, including ‘private brands’ which are offered under numerous names to supermarkets and other customers. In June, 1956, Maier commenced the use of the name ‘Black & White’ on canned beer which was and is retailed by defendant Ralphs in Los Angeles. During the past several years Ralphs has built up a limited but valuable market for ‘Black & White’ beer in its thirty-two stores in the Los Angeles area.

“12. The name ‘Black & White’ had previously been used as a trademark for bottled beer by the St. Claire Brewing Co. of San Jose, California, from 1935 until 1938 when that brewery ceased business. Maier learned of such use and abandonment through its salesman, Mr. Mosiman, who had been a salesman for St. Claire Brewing Co. and had sold ‘Black & White’ beer for St. Claire Brewing Co. before going to work for Maier.

“13. The St. Claire Brewing Co. had registered the mark ‘Black & White’ for use on beer with the Secretary of State of California.

“14. In the fall of 1936, National Distillers, which was then the exclusive United States importer of Buchanan’s Scotch whisky, had knowledge of the use of the name ‘Black & White’ by the St. Claire Brewing Co. for the latter’s beer and protested such use by writing one letter to St. Claire, but neither National Distillers nor Buchanan took any further action or legal action to enjoin the same.

“15. Defendant Maier, who know of plaintiffs’ ‘Black & White’ Scotch whisky, adopted the name ‘Black & White’ for its beer because of the belief that the two products were so distinct that there would be no likelihood of confusion between the products or confusion as to the source of the products.

“16. Maier adopted the ‘Black & White’ label for beer in good faith, and in fact sought to acquire title to the name ‘Black & White’ for use on beer from the St. Claire Brewing Co. St. Claire consented to such use, but there was no privity between St. Claire and Maier. There was no intent or attempt by defendants to trade on the good will of plaintiffs.

“17. The labels of defendant Maier bearing the name ‘Black & White’ bear absolutely no resemblance to plaintiffs’ labels and clearly indicate that defendants’ beer is manufactured by Maier.

* * *

“23. There is no evidence of confusion . . . nor any belief among the public that ‘Black & White’ beer is the product of plaintiffs or connected, in any way, with plaintiffs.

“24. Plaintiffs have not been damaged by defendants, nor are they likely to be in the future, nor has their good will in their Scotch whisky been damaged or diminished.

“25. Defendants have not suggested or inferred in any fashion, nor have they made any effort to suggest that ‘Black & White’ beer is the product of plaintiffs, nor have they been guilty of practicing any deception in any manner whatsoever.

“26. The labels and containers used by defendants are so distinct and different from those used by plaintiffs that they would not tend to deceive or confuse an ordinary buyer as to the product or the source thereof.

“27. Plaintiffs’ own witness, in testifying as to the scope of the trademark ‘Black & White’ and the use of the Scottie dogs, conceded that defendants’ label was distinct and very candidly admitted that there was no evidence of confusion, nor loss of sales of plaintiffs’ Scotch whisky.

“28. There is no real competition between plaintiffs’ Scotch whisky and defendants’ beer . . .”

(Volume I, pp. 1-196, Transcript of Record, No. 17696 at pages 64, 66, 67, 69, 70.)

PART II:

THE RULING AND REMAND OF THE COURT (314 F.2d 149, 161-162) PROVIDED AS FOLLOWS:

“We hold therefore that the court below was in error in granting the injunction prayed for.

“The judgment is reversed and the cause is remanded to the district court with directions to enter judgment in accordance with this opinion. *The question of plaintiffs’ right to an accounting, not having been dealt with on the previous trial, remains for decision by the district court.*”

PART III:

THE PROCEEDINGS UPON REMAND OF THE
ACCOUNTING ISSUES.

A. On January 21, 1964, without taking evidence and without stipulation and over objection of appellants the District Court made its order reading in relevant part:

“10. An accounting of defendants’ profits shall be had with all convenient speed. In connection with said accounting, defendants are ordered to allow plaintiffs and their representatives to inspect and make copies of any and all records, books of account, invoices, income tax returns and document and books showing defendants’ respective sales and profits.”

(Volume I, Transcript of Record,
page 2.)

B. In the hearing responsive to the foregoing order appellants again objected to the absence of trial of the issues of plaintiffs’ right to an accounting and their objection was expressly reserved, in relevant part:

“Mr. Hutchinson: I think that we are not in agreement with Mr. Hanger that he has carried his burden of proof. That is why I would like to have all objections reserved . . .

• • •

“... And as I read the record, *they have removed the contention that they were damaged in their economic interest. Protection of the [mark] from [dilution] is one thing, but to take money as damages, or accounting, if that is not two ways of saying the same thing, requires showing that they had some financial loss . . .*

“The Court: The testimony at the trial from the representative, plaintiffs’ representative, was categorically that there was no confusion.

“Mr. Hutchinson: No actual confusion.

“The Court: And that was stated on cross-examination

. . .

You reserve your right and I will consider the issue as a legal issue at the termination of the accounting.

“Mr. Hutchinson: Yes, I hope we could reserve our objections without taking undue time. Otherwise, we would waive [them] by going forward.”

(Volume II, Transcript of Record,
pages 7-12.)

PART IV:

APPELLANTS' ACCOUNTANTS AND THE DISTRICT COURT EXCLUDED ADMITTED AND LAWFUL BUSINESS EXPENSES RECOGNIZED BY BUSINESS, ACCOUNTING PRACTICES AND LAW:

Appellees' accountant's unsupported “add backs” included the following:

1.	Maier	
	a. Advertising	\$ 647,990
	b. Abandonment losses on breweries purchased for brewing purposes	1,589,419
	Total	<hr/> \$2,236,409
2.	Ralphs:	
	a. Advertising	15,106
	b. Packaging and wrapping	3,154
	Total	<hr/> 18,260

No. 21324

IN THE

MAY 6 1969

United States Court of Appeals

FOR THE NINTH CIRCUIT

See VR 3395

CARL W. SPAHR and WILLIAM A. KAISER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Rehearing and Request for Rehearing
in Banc.

HOCHMAN, SALKIN & DERoy,

By HARVEY D. TACK,

6222 Wilshire Boulevard,
Los Angeles, Calif. 90048,

Attorneys for Appellants.

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APR 29 1969

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No. 21324

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL W. SPAHR and WILLIAM A. KAISER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Rehearing and Request for Rehearing in Banc.

*To the Honorable Charles L. Powell, District Judge,
and M. Oliver Koelsch and James R. Browning,
Circuit Judges:*

Appellants, Carl W. Spahr and William A. Kaiser, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, petition this honorable Court for a rehearing to reconsider the decision filed in this Court in this action on March 28, 1969. An extension of time to file this Petition was granted on April 8, 1969, extending the time for filing to April 28, 1969. Appellants request that the Court restore this case to the calendar for reargument for the reasons set forth below.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, appellants suggest the appropriateness of a rehearing in banc because of the importance of the questions raised herein.

Appellants request that the rehearing be directed to the following questions:

1. Have the decisions of the Supreme Court in *Mathis v. United States* and *Orozco v. State of Texas* made this Court's decision in *Kohatsu v. United States* no longer relevant to the issues herein? Should the warnings set forth in the *Miranda* and *Escobedo* cases been given to the appellants?

2. Has the Court properly failed to rule on appellants' contention that their verbal assent to the warrantless search was rendered ineffective by their lack of knowledge of this right? In this regard, if the record is silent with regard to the waiver, which party must bear the burden of the silent record? *Schoepflin v. United States*, 391 F. 2d 390, 397-399.

3. Is the Court's reliance (in holding that there has been no misrepresentation as to the purpose of the investigation by agents Byerly and Horn) on the case of *United States v. Sclafani* well placed in light of the factual distinctions between the case at bar and the *Sclafani* case?

Miranda and Escobedo Decisions.

The cases of *Miranda v. State of Arizona* (1966), 384 U.S. 436, 86 S. Ct. 1684, and *Escobedo v. State of Illinois* (1964), 377 U.S. 478, deal not with Fifth Amendment rights, or an expansion of those rights, but with the right to counsel. As stated in *United States v. Wade* (1967) 388 U.S. 218, 87 S. Ct. 1926, 1932, *Miranda* does not link the right to counsel only to protection of the Fifth Amendment rights.

"It is central to that principal that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate the accused's right to a fair trial."

The cornerstone case in this Circuit dealing with the obligation of government agents to issue warnings to a taxpayer in a criminal tax case has been *Kohatsu v. United States* (9th Cir., 1965), 351 F. 2d 898. In that case, relied upon by the Court herein at page 3 of its opinion, the Court reasoned that in a tax case the investigating agents are attempting to determine whether a crime has been committed rather than whether the particular suspect has committed the crime. By this interpretation the ruling of *Escobedo* was made inapplicable to income tax investigations of a criminal nature.

In *Mathis v. United States* (1968), 391 U.S. 1, 88 S. Ct. 1503, decided after argument herein, the Court ruled that the *Miranda* warnings must be given to an inmate in a state penitentiary when questioned by an Internal Revenue Agent. The Court noted that there was no doubt that the documents and oral statements given by petitioner to the government agent and used against him were strongly incriminating. These "strongly incriminating" statements by the defendant were that he had prepared 1960 and 1961 income tax returns, and that the signatures thereon were his. The defendant also signed forms extending the statute of limitations. The government argued that *Mathis* involved a routine tax investigation by an Internal Revenue Agent—a civil investigator.

The Court noted:

"It is true that a 'routine tax investigation' may be initiated for the purpose of a civil action rather than criminal prosecution. To this extent tax investigations differ from investigations of murder, robbery, and other crimes. But tax investigations frequently lead to criminal prosecutions, just as the one here did. In fact, the last visit of the revenue agent to the jail to question peti-

tioner took place only eight days before the full-fledged criminal investigation concededly began. And as the investigating revenue agent was compelled to admit, there was always the possibility during this investigation that his work would end up in a criminal prosecution. *We reject the contention that tax investigations are immune from the Miranda requirements for warnings to be given a person in custody.*" (391 U.S., at 4; emphasis added.)

Contrast the limited admissions in *Mathis* and the fact that the last visit to jail took place only eight days before the full-fledged criminal investigation began with the facts in this case. Here a full-fledged criminal investigation had been proceeding for one and one-half years before the meetings in question. The documents turned over to the criminal investigator were indispensable to the government's case.

The feature distinguishing *Mathis* from this case is the illusive definition of "custody". The dissenting opinion of Mr. Justice White noted that the record before the Court did not demonstrate that the civil investigation had raised suspicions of criminal conduct by *Mathis* at the time of the visit, and further noted:

"The State of Florida was confining petitioner at the time he answered Agent Lawless' questions. But *Miranda* rested not on the mere fact of physical restriction but on a conclusion that coercion—pressure to answer questions—usually flows from a certain type of custody, police station interrogation of someone charged with or suspected of a crime. Although petitioner was confined, he was at the time of interrogation in familiar surroundings. Neither the record nor the Court suggests reasons why petitioner was 'coerced' into answering Lawless' questions anymore than is the citizen

interviewed at home by a revenue agent or interviewed in a Revenue Service office to which citizens are requested to come for interviews." (391 U.S. at 7.)

"Custody" is a concept now dealing with the status of the investigation at the time of the inquiry as well as the place of the inquiry. In *People v. Ceccone* (1968), 260 A.C.A. 937, 67 Cal. Rptr. 499, 503, the California Appellate Court analyzed the obligations of investigating officers under the *Escobedo* and *Miranda* rules and concluded:

"*Miranda* does not specify at what point a permissible general on-the-scene questioning of the citizens in the fact finding process (see 384 U.S. at 477-478, 86 S.Ct. 1602) become a custodial interrogation. The Court implies, however, that an interrogation becomes 'custodial' when the investigation becomes focused upon the person being interrogated. (384 U.S. at 444, footnote 4, 86 S.Ct. 1602). *Once the investigating officer has probable cause to believe that the person being detained for questioning has committed an offense, the officer cannot be expected to permit the suspect to leave. At that point, at the latest, the interrogation becomes custodial and prior to any further questioning the suspect must be warned of his rights. . . .* The burden of showing of whether defendant was in custody and whether or not he was suspect was on the prosecution." (See also *People v. Chavira* (1967), 253 Cal. App. 928, 61 Cal. Rptr. 407, 410).

The definition of "custody" has recently been expanded in *Orozco v. State of Texas*, 37 L.W. 4260, decided on March 25, 1969. In that case four police officers obtained entrance to the premises in which the de-

fendant was residing, entered his bedroom and began to question him. From the moment he gave his name, according to the testimony of one of the officers, the petitioner was not free to go where he pleased, but was "under arrest". There is no indication that the defendant was advised of this fact. The Court held that this bedroom interrogation came within the scope of the *Miranda* case and reversed the lower court. In dissent, Mr. Justice White noted:

"Here, there was no prolonged interrogation, no unfamiliar surroundings, no opportunity for the police to invoke those procedures which moved his majority in *Miranda*. In fact, the conversation was by all accounts a very brief one. According to the uncontradicted testimony, petitioner was awake when the officers entered his room, and they asked him four questions. . . . It is unquestioned that this sequence of events in their totality would not constitute coercion in the traditional sense or lead any court to view the admissions as involuntary within the meaning of the rules by which we even now adjudicate claims of coercion relating to pre-*Miranda* trials." 37 L. W. at 4261-4262.

Although several Courts of Appeal have been loath to expand the *Miranda* doctrine to criminal tax investigations (most of these courts have relied on the *Kohatsu* decision of this Court), many well reasoned opinions have been written by District Courts holding that evidence was subject to suppression in income tax cases because of the failure to issue the *Miranda* warning. We urge this Court to consider the following cases which are in addition to those previously cited in appellants' opening and reply briefs. *United Stats v. Wainwright* (D.C. Colorado, 1968) 284 F. Supp. 129;

United States v. Dickerson (N.D. Illinois, 1968), 291 F. Supp. 633, 636-637, where the Court noted,

“The government suggests that the defendant was in no way physically restrained, but we doubt that he really felt free to walk out on the investigators from the Internal Revenue Service. In the absence of sufficient warnings and the assistance of counsel, there are enumerable factors which act on the taxpayer’s mind compelling him to ‘cooperate’ with the federal authorities.”

The cases cited herein have been decided subsequent to argument in the case at bar. There has been a substantial shift in the law since the trial of this case in 1966 and presentation of the appeal in 1967. These changes, we believe, are sufficient to justify a rehearing on the question of the applicability of the *Miranda* and *Escobedo* decisions to this particular tax investigation. (See also *Windsor v. United States* (5th Cir., 1968), 389 F. 2d 530, 534). We believe that this Court will not again see a tax case in which the accusatory stage had so clearly been reached (Appellant’s Op. Br., pp. 17-25, 48, 55-56). The case had in fact proceeded beyond the status of a “criminal investigation”, as distinguished from a “routine tax investigation”, and had reached the stage where the investigating agents sought two pieces of evidence necessary to obtain conviction of the appellants.

Warrantless Search.

On pages 4 and 5 of the Court’s Opinion, the Court holds that although the appellants filed a Motion to Suppress on the grounds that their Fourth Amendment rights were violated, the appellants did not specifically argue below that the verbal assent to the warrantless search was rendered ineffective by their lack of knowledge of this right.

The general issue of the illegal search was presented to the lower court in several instances. In appellants' Motion to Suppress, filed April 4, 1966, the issue of the nondisclosure of the status of the case by the agents is presented [Clk. Tr. 34-36]. In the Supplement to Memorandum filed on April 15, 1966, appellants discussed in detail the rights which they could have asserted in responding to a properly issued administrative summons in the event that the agents had respected appellants constitutional rights [Clk. Tr. 69-70]. In the Memorandum filed on June 21, 1966, appellants raised the argument that the agents had sufficient evidence in their possession to obtain a warrant for appellants arrest at the time of the initial visit [Clk. Tr. 91-92; See also Clk. Tr. 43-45, 94-96]. The trial court was aware of the broad objection, as is evidenced by its holding [Rep. Tr. 34].

This Court relies upon the case of *Standley v. United States* (9th Cir., 1963), 318 F. 2d 700, 701 on the issue of failure to raise the question of search warrants below. In that case the appellant raised two points which were not presented in any form to the District Court. With regard to the Fifth Amendment point raised on appeal, the Court analysed the issue and found it of no merit. The point which the Court did not consider was the issue of the mental competency at the time of the defendant's guilty plea sentence, which obviously raised entirely new issues. The facts in *Standley* must be contrasted with those in this case. Defendants Exhibits "A" and "C" contain detailed information on the entire sum and substance of the events taking place on April 14 and April 16, 1964. Agent Byerly testified in great detail to those events, and to the events preceding the claimed illegal search.

Appellants further note that at no time during this appeal proceeding did the government contend that the

issue of the warrantless search had not been raised sufficiently in the court below.

Waiver of constitutional rights is never presumed; when the record is silent or unclear on the issue of waiver of a constitutional protection, the government has failed to meet its burden of proof of that waiver. Cases clearly stating this rule *re* the Sixth Amendment right-to-counsel are *Miranda v. State of Arizona* (1966), *supra*; *Johnson v. Zerbst* (1938), 304 U.S. 458, 464. A silent record on the issue of waiver means that the government has not met its burden. *Carnley v. Cochran* (1962), 369 U.S. 506, 516, 82 S. Ct. 884.

The same rule applies with regard to consent to search.

“When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.” *Bumper v. State of North Carolina* (1968), 391 U.S. 543, 548-549, 88 S. Ct. 1788, 1792.

In *Kaufman v. United States*, 37 L.W. 4238, decided March 24, 1969, the defendant was tried and convicted of armed robbery. At trial his only defense was insanity. The Court of Appeals affirmed the conviction on direct appeal. Petitioner then initiated a proceeding under Section 2255 and included a claim that the finding of sanity was based on the admission of illegally seized evidence. The Court held that this issue was properly raised even though it was not raised at trial or on appeal. Should not this Court rule on the legality of the seizure in light of *Kaufman*?

Appellants believe that the ruling herein is inconsistent with the procedure for remedying this problem as

set forth in *Schoepflin v. United States* (9th Cir., 1968), 391 F. 2d 390, 397-399. In that case the precise issue of consent to a warrantless search was presented on appeal; the appellant claimed on appeal that the waiver was without knowledge of his rights. The record was incomplete on the issue of waiver—whether such issue was raised and whether in fact there was a waiver of a known right. The solution adopted by this Court was to *remand* the case for further findings, 391 F. 2d at 399. Appellants respectfully believe that the record herein demonstrates no knowing waiver and that the evidence should have been suppressed. In the alternative, remand to the trial court would be appropriate. See also *Cipres v. United States* (9th Cir., 1965), 343 F. 2d 95.

Failure to Advise of Nature of Investigation.

The Court relies on the case of *United States v. Sclafani* (2nd Cir., 1959), 265 F. 2d 408 in deciding the issue of whether there was actual or tacit deception in this case. In *Sclafani*, the case was originally assigned to a revenue agent. His duty was to go out and audit the returns assigned for investigation; he truthfully told the taxpayer that he was there on a "routine audit". As a result of subsequent discovery of discrepancies between the corporate books and certain corporate checks, the agent has subsequent discussions with the taxpayer, and only after these discussions referred the case to a special agent. In analyzing the problem, the Court stated:

"Moreover it is unrealistic to suggest that the government could or should keep a taxpayer advised as to the direction in which its necessarily fluctuating investigations lead. The burden on the government would be impossible to discharge in fact, and would serve no useful propose." 265 F. 2d at 415.

The case of *Kohatsu v. United States*, *supra*, also involved a routine audit which was subsequently referred to the Intelligence Division.

Contrast the facts in *Sclafani* and *Kohatsu* was those in this case. The initial contact was not by a revenue agent but by a special agent accompanied by a revenue agent; the case was not assigned as a routine audit, but was originally an information item which had been worked by a criminal investigator for one and one-half years prior to contact with the taxpayer; the investigation was not a general inquiry into the tax liability of the corporation, but was for the limited purpose of gathering evidence confirming their established position. This limited function was performed in a matter of minutes. There was no change in the nature of the investigation to be detected by the investigatee because of the limited scope of the investigation. There was no "audit" as that term is normally construed; the investigating agents were there to photocopy documents pursuant to a prearranged schedule. The nomenclature of "routine tax investigation" simply does not apply to this case; it must be viewed in light of its very unusual facts.

In *United States v. James* (6th Cir., 1967), 378 F. 2d 88, 90, the Court held that a search pursuant to a proper arrest was invalid because of unusual facts. Ten police officers arrested the defendant in her apartment pursuant to a warrant for her arrest. The testimony disclosed that there was a preconceived plan to search the house prior to entry of the premises. In holding this search illegal, the Court stated:

"Taking into account all of the admitted facts and circumstances of the case, including the large aggregation of agents and police officers, it seems to us that the agents and officers were interested in something more than merely making an arrest.

It is clear that their primary purpose was to make a general exploratory search of the apartment, with the hope of finding narcotics. This search, in our judgment, was unreasonable and violated the rights of appellant *James* under the Fourth Amendment to the Constitution."

Is not this situation analogous to Internal Revenue Agents seeking to copy pre-selected items under the guise of an audit?

For these reasons, appellants request that a rehearing be granted.

Respectfully submitted,

HOCHMAN, SALKIN and DeROY,

By HARVEY D. TACK,

Attorneys for Appellants.

Certificate.

I hereby certify that in my judgment the Petition for Rehearing is well founded and further certify that it is not interposed for delay.

HARVEY D. TACK

1 See Vol. 3434
No. 21,337

IN THE

FEB 20 1969

**United States Court of Appeals
For the Ninth Circuit**

TRI VALLEY GROWERS, formerly known as
TRI VALLEY PACKING ASSOCIATION (a
corporation),

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

REPLY BRIEF FOR PETITIONER

FRANCIS KERNER,

660 Market Street,
San Francisco, California 94104,

RICARDO J. HECHT,

1 Maritime Plaza,
San Francisco, California 94111,

Attorneys for Petitioner.

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No. 21,337

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TRI VALLEY GROWERS, formerly known as
TRI VALLEY PACKING ASSOCIATION (a
corporation),

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

REPLY BRIEF FOR PETITIONER

1. THE COMMISSION DID NOT HAVE POWER TO ADDUCE ADDITIONAL EVIDENCE WITH RESPECT TO THE TWO ISSUES REMANDED IN CONNECTION WITH THE PRICE DISCRIMINATION CHARGES.

The Commission asserts, in substance, that its action in adducing further evidence with respect to the two issues remanded in connection with the Section 2(a) charges was a proper exercise of discretion entirely consistent with this Court's mandate (Respondent's Supplemental Brief, pp. 16-17¹). There is implicit in this assertion an admission that *if* its action was in conflict with the mandate the Com-

¹This brief will be hereinafter referred to as "RSB".

mission was without power to take and consider this evidence. Consequently to establish that the Commission's conduct is incompatible with the Court's directive we shall revert to the precise terms of the Court's opinion dealing with the remand of the 2(a) issues. *National Labor Relations Board v. Donnelly Garment Company*, 330 U.S. 219, 226; 91 L.ed. 854, 861-862(1947).

(a) The causal connection issue.

In remanding the *first* of the two 2(a) issues this Court stated:

While Tri-Valley presented before the Commission *the factual basis* upon which this argument is made, it did no more than suggest the legal question which it now urges concerning the necessity of a causal connection between price differentials and probable competitive injury. This may explain why the Commission did not deal with the problem in its opinion or *findings*. Nor have Commission counsel dealt with the contention in their brief in this court.

Disposition of this question is dependent upon the facts pertaining to the availability, to non-favored purchasers, of the low prices for Tri-Valley products on the California Street market, and the application of the law to those facts. *It is not our function to find these facts, and the Commission should first speak as to the application of the law to the facts which are found.* We have therefore concluded that the proceedings should be remanded to the Commission for that purpose unless we can and do determine, on this review, that Tri-Valley established a de-

fense which exculpates it even if there have been section 2(a) price discriminations.²

(329 F.2d 704)

There is nothing in this command or in the accompanying statements explaining its issuance indicating that the Court felt that the evidentiary record then before it was insufficient for the declared purpose of the remand, i.e. *to find the facts and speak as to the application of the law to the facts found*. Accordingly, there was no reason that would impel the Court to authorize the taking of additional evidence or to direct that the evidence already received be reheard. *Ford Motor Company v. National Labor Relations Board*, 302 U.S. 364, 373-374, 83 L.ed. 221, 229-230 (1939). Nevertheless, the Commission insists that this Court clearly indicated that additional evidence could be received, and in an attempt to rationalize this assertion declares:

A fair reading of the Court's opinion supports the interpretation of the Commission and its examiner that "[i]n permitting new findings as to the Section 2(a) charges, the Court clearly indicated its intention that further evidence could be adduced if necessary." R. XXII, 1907. (RSB, p. 15).

This rationalization has no validity when considered in the light of the Court's opinion remanding the first of the 2(a) issues. The Court had no occasion to permit "new findings" to be made because

²All emphasis added to quoted material is supplied by us, unless otherwise indicated.

there were no "old findings". Also the Court was not called upon to authorize the making of "new and additional findings" for the reason that there were no "old and insufficient findings" to be supplemented and clarified. *What the Court noted was that there was a total absence of findings as to this issue*, and consequently it directed that the Commission make findings with respect to this hitherto unexplored area of the evidentiary record. Accordingly, there is no valid premise to support the Commission's conclusion that "the Court clearly indicated its intention that further evidence could be adduced if necessary." Moreover, the evidence then in the record was entirely sufficient to support findings to the effect that the Commission had failed to establish that the Petitioner's discriminations were the proximate cause of competitive injury. With respect to this it should be borne in mind that at no time prior to the filing of its supplemental brief herein (RSB, footnote p. 17) had the Commission ever applied for leave to adduce further evidence to remedy patent defects in its proof. 15 U.S.C. Sec. 21(c).

It is, therefore, submitted that the reception of further evidence as to this issue was unauthorized and unnecessary. *Zdanok v. Glidden Co.*, 327 F.2d 944, 949-950 (2 Cir. 1964), cert. denied 377 U.S. 934, 12 L.ed 2d 298 (1964).

(b) The meeting of competition issue.

In remanding the *second* of the two 2(a) issues this Court said:

In their brief on this appeal the Commission counsel defend the Commission view as stated in the quoted findings, and apparently also the broader view expressed in the Commission's opinion. But Commission counsel also suggest another basis for the determination that the "meeting of competition" defense had not been established. This basis, which may be preferred by Commission counsel since it is presented first, *is that a lowered price is within the proviso of section 2(b) only if it is made in response to an individual competitive demand, and not as part of the seller's pricing system, such as that represented by the California Street market.*

This would appear to be a threshold question which ought to be resolved before questions concerning the duty of a seller to adduce evidence as to the lawfulness of competitive prices, or as to the seller's knowledge of such lawfulness, are reached. If, as Commission counsel now contend, Tri-Valley was not engaged, in the California Street market, in meeting "an equally low price on a competitor," within the meaning of proviso to section 2(b), that is the end of the matter, insofar as that defense is concerned. What Tri-Valley's duty would be concerning the production of evidence bearing upon the lawfulness of competitive prices then becomes immaterial, for there would be no competitive prices within the contemplation of the proviso.

The Commission should accordingly deal first with this question on the facts and law and, indeed, until it has done so it will not be known whether this court will have to deal with that

question or any other question concerning the "meeting competition" defense.

A remand of the cause is therefore necessary for further proceedings bearing upon the unresolved price discrimination question to which we have previously referred, *and upon the question of whether the competition which Tri-Valley faced in the California Street market is the kind of competition contemplated by the "meeting of competition" defense of section 2(b).*

(329 F.2d 706)

This order and the reasons given for its promulgation show that the remand was solely for the purpose of giving the Commission the opportunity of resolving the question "whether the competition which Tri-Valley faced in the California Street market is the kind of competition contemplated by the 'meeting of competition' defense of section 2(b)."³ Moreover there is nothing therein that shows that the Court had any misgivings that the evidentiary record then before it was not fully adequate to enable the Commission properly to resolve the legal issue thus entrusted to it. Therefore, there is no reasonable basis for claiming that the Court had tacitly authorized the Commission to augment the record if it was deemed necessary.

The Commission had made *no* findings with respect to the legal issue so remanded, and hence there

³The question thus to be resolved was also phrased by the Court as follows: "[Whether] a lowered price is within the proviso of section 2(b) only if it is made in response to an individual competitive situation and *not* as part of the seller's pricing system such as that represented by the California Street market."

is no basis for arguing that “(i)n permitting *new* findings as to the Section 2(a) charges, the Court of Appeals clearly indicated its intention that further evidence could be adduced if necessary” (RSB, p. 15.) In this connection it is well to remember that the Commission had made no findings that would or would not bring the method of doing business on California Street within the ambit of the pricing system denounced in *Federal Trade Commission v. A. E. Staley Manufacturing Company*, 324 U.S. 746, 89 L.ed 1338 (1945). Cf. *Callaway Mills Company v. Federal Trade Commission*, 362 F. 2d 435, 441-442 (5 Cir. 1966).

Finally, as to both the 2(a) issues remanded it should be noted that the Court *did* limit the Commission’s discretion in carrying out the Court’s directions because *it did not authorize it* to receive any further evidence with respect thereto. We repeat, therefore, that this being a matter of jurisdiction and not of procedure, the price discrimination issues have returned to this Court in virtually the same evidentiary posture as at the time of its first decision (Petitioner’s Supplemental Brief, p. 20).

2. THE LAW OF THIS CASE PRECLUDES THE CONSIDERATION OF THE NEW FINDINGS OF FACT MADE BY THE COMMISSION.

The Commission describes its numerous “new”, new findings regarding the class of purchasers and competition affected by Petitioner’s discriminations as being “essentially a recapitulation of findings made previously by the Commission and *affirmed by this*

Court in the prior review proceedings," and having so described them argues that there is no authority "precluding further discussion and recapitulation of findings in a subsequent administrative decision *so long as they are not in conflict with the Court's mandate*" (RSB, p. 14), and it is on this ground that the Commission justifies the tardy importation of these "new", new findings into the proceeding without leave of this Court.

Whether these findings are a mere recapitulation of findings previously approved and consistent with the Court's mandate can be determined by first considering this Court's delineation of the Commission's prior "new findings," and then considering in summary the content of the "new", new findings.

As to the Commission's prior "new findings" this Court said:

In the findings of fact incorporated in the initial decision of the examiner, it was found generally, and also with respect to seven specified sets of favored and disfavored purchasers, that such purchasers are competitively engaged *in the resale of Tri-Valley products*. Thus, both as to the identity of purchasers and the kind of affected competition, the findings of the examiner did not go beyond what petitioner asserts are the limited allegations of the complaint.

But the Commission, upon its review of the initial decision, *vacated the examiner's findings and entered new findings*. In these *new* findings the class of affected purchasers and the kind of affected competition were not confined to, *nor do they necessarily include*, purchasers who di-

rectly or indirectly compete with each other in the resale of *Tri-Valley* products, or competition of that kind. In the new findings the class of affected purchasers was found to be that in which purchasers competed, directly or indirectly, in the resale of canned fruits and vegetables under each purchaser's private label.⁴

(329 F. 2d 698)

By the foregoing reference to the Court's opinion, it is definitely established that the Commission found through its prior new findings that the class of purchasers affected were those who competed directly or *indirectly*,⁵ "in the resale of canned fruits and vegetables under each purchaser's private label."

The majority of the Commission's "new", new findings differ radically from those which this Court affirmed in the first review proceedings. For example, six (6) of these declare, in effect, that the numerous retailer customers of ten (10) disfavored wholesaler-purchasers *compete* with favored retailer-purchasers "*in the sale of respondent's products.*" (Finding 10, R. XXII, p. 1884; Finding 11, R. XXII, 1885; Finding 13, R. XXII, 1886; Finding 15, R. XXII, 1886; Finding 17, R. XXII, 1887; Finding 23, R. XXII, 1890). That the difference between the two sets of findings is more than just formal is demonstrable.

⁴Footnote 8 has been omitted.

⁵"In the context of this case, '*indirect*' competition between purchasers occurs when a retailer who obtains his goods from a disfavored wholesaler-purchaser is in competition with a favored retailer-purchaser." (Footnote 5, 329 F. 2d 698)

The Commission in its first decision while dealing with its first set of findings declared, in substance, that there is *no evidence* that any of the independent retailers "actually sold any of respondent's goods," and therefore reasoned that it was the competition in private label goods purchased from *various canners* that proximately caused the injury to competition between favored retailers and these retailer customers of non-favored wholesalers (Finding 6, R. VI, 574; Opinion, R. VI, 584). On the other hand, the Commission in dealing with its second set of findings reasoned that it was competition in the sale of Petitioner's products—not in the sale of private label merchandise—that proximately caused the injury to the competition between these retailers.

It is apparent therefore that what the Commission has done amounts to more than just a recapitulation of prior findings, and that its "new", new findings are *inconsistent* in basic theory with those approved by this Court. The prior findings thus approved patently *are the law of this case*, and as such they do not permit the litigation and relitigation of issues thereby finally settled.

Most appropriate in their application to the Commission's conduct in this case are the following remarks of the Court of Appeals for the Seventh Circuit in *Morand Bros. Beverage Co. v. National Labor Relations Board*, 204 F. 2d 529, 532 (1953):

* * * The pronouncements of the reviewing court are then known in the vernacular as "the law of the case", i.e., they are the rules to govern the particular dispute at hand, unless, of course,

the decision of the reviewing court is declared erroneous by a tribunal of competent jurisdiction holding a still more superior position in the judicial pyramid. In such a situation it behooves the inferior arbiter to exercise great care that "the law of the case" is applied to the facts of the case when they have been precisely determined by it. This is so even when it finds itself in well founded disagreement with its reviewer.

There is a most salutary reason for our adherence to this doctrine. While we must take care that improper or ill-conceived decisions be held to a minimum, and, when they appear, be quick to supplant them with sound decisions, we must remember that the particular lawsuit must, at sometime, come to an end. It is conceivable, though admittedly highly improbable, that an individual piece of litigation could be bounced up and down endlessly, from trial to appellate court, merely because of the refusal of the lower body to apply the law as announced by the reviewing one. In short, experience has taught that causes are disposed of most expeditiously when the correction of errors is left to the superior tribunals and those enjoying judicial or administrative inferiority studiously endeavor to comply with the mandate issued to them.

Undaunted by the law of the case, the Commission also contends with respect to the 2(a) charges that new findings are necessary and proper to appraise the scope of the relief that should be granted and to fashion an *appropriate* cease and desist order (RSB, p. 15). In connection with this contention, it is well

to note that the cease and desist order that the Commission fashioned and issued when making its *first* decision is identical to the one it issued when it made its second decision (R. VI, 578; R. XXIV, 2146). It is evident then that the Commission is now wholly aware that its broad and harsh order cannot be justified on the basis of the facts first found by it. Accordingly, if properly to sustain this order additional evidence and findings were necessary, the Commission was required by law to make timely application to this Court for leave to adduce such evidence and to make such new findings (15 U.S.C. 21(c)), but this it did not do.

3. THE SUPREME COURT'S DECISION IN *FRED MEYER, INC.*, IS NOT APPLICABLE HEREIN.

Ostensibly on the basis of the Supreme Court's opinion in *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341, 19 L. Ed. 2d 1222 (1968), the Commission seeks (1) reconsideration of this Court's prior ruling made with respect to the Section 2(d) charges, insofar as it requires a showing of functional competition, and (2) leave further to modify the cease and desist order issued in connection with said charges (RSB, pp. 36-40). The partial reversal in that case of this Court's decision in *Fred Meyer, Inc. v. Federal Trade Commission*, 359 F. 2d 351, did not affect this Court's teaching that a seller's obligations under 2(d) are limited to customers who compete with each other on the same functional level.

Standard Oil Company of California v. Perkins, 396 F. 2d 809, 817-818 (9 Cir. 1968).

The partial reversal of this Court's said decision stems from evidence and findings based thereon which are *not present in this cause*. This is apparent from the following excerpt taken from the opinion of the Supreme Court:

* * * In the case before us, it is conceded that Meyer was a customer of Tri-Valley and Idaho Canning. *Moreover, as indicated by its approval of the Commission's § 2(a) ruling, the Court of Appeals did not question the Commission's finding that Meyer competed in the resale of Tri-Valley and Idaho Canning products with retailers who purchased through Hudson House and Wadhams.* Given these findings, it was unnecessary for the Commission to resort to the indirect customer doctrine. Whether suppliers deal directly with disfavored competitors or not, they can, and here did, afford a direct buyer the kind of competitive advantage which § 2(d) was intended to eliminate. In light of our holding that "customers" in § 2(d) includes retailers who buy through wholesalers and *compete* with a direct buyer in the resale of the supplier's product, the requirement of direct dealing between the supplier and disfavored competitors imposed by the Court of Appeals rests on too narrow a reading of the statute. *Further, in light of the Commission's finding that Meyer competed in the resale of the Idaho Canning and Tri-Valley products with other retailers in the area who purchased through Hudson House and Wadhams and in light of the fact that the Court of Appeals did not disturb this finding, the court*

*misapprehended the Commission's burden in requiring it to trace those products to the shelves of the disfavored retailers.*⁶

(390 U.S. 353-354, 19 L. Ed. 2d 1231)

The findings referred to by the Supreme Court regarding Meyer's *direct* competition in Petitioner's products with other retailers in the area who purchased these goods through Hudson House are based on oral evidence, which is summarized in the opinion of this Court in *Meyer*, as follows:

But a Portland retailer witness specifically testified that he competed directly, in peaches of the grade and quality purchased from Hudson House, with a nearby Meyer store. * * *

(359 F. 2d 351)

No such witness testified to a similar effect in this case, and consequently the evidence and the findings on which the Supreme Court relied so to partially reverse the decision of this Court in *Meyer* are not operative in *Tri-Valley*.

It is submitted therefore that the Commission's plea for reconsideration and for leave further to modify said order should be denied.

Dated, San Francisco, California,
January 12, 1969.

Respectfully submitted,

FRANCIS KERNER,

RICARDO J. HECHT,

Attorneys for Petitioner.

⁶Footnote 19 has been omitted.

N O. 2 1 3 5 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHNNY SABBATH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

MAR 10 1969

APPELLEE'S BRIEF

APPEAL FROM
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FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FILED

JAN 30 1967

WM. B. LUCK, CLERK

EDWIN L. MILLER, JR.,
United States Attorney,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

N O. 2 1 3 5 3

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PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

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United States Attorney,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

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IN THE UNITED STATES COURT OF APPEALS
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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in both counts of a two-count indictment, at the conclusion of trial by jury [C. T. 2-3, 5]. ^{1/}

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28,

^{1/} "C. T." refers to the Clerk's Transcript of Record.

II

STATEMENT OF THE CASE

Appellant was charged in both counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged that appellant and William Edward Jones, also known as William Dale, knowingly imported and brought approximately one ounce of cocaine, a narcotic drug, into the United States from Mexico, in violation of Title 21, United States Code, Section 173 [C. T. 2].

Count Two charged that appellant and Jones knowingly concealed and facilitated the transportation and concealment of, approximately one ounce of cocaine, a narcotic drug, which, as they then and there well knew, had been imported and brought into the United States contrary to law [C. T. 3].

Jury trial of appellant commenced on June 16, 1966, before United States District Judge Fred Kunzel [R. T. 5]. ^{2/} Appellant was found guilty as charged on the same date [C. T. 5]. Thereafter, on July 25, 1966, appellant was committed to the custody of the Attorney General for ten years upon each count, to run concurrently [C. T. 4]. He thereafter filed a timely notice of appeal [C. T. 7].

^{2/} "R. T." refers to the Reporter's Transcript on Appeal.

III

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

1. Alleged error in denying the motion to strike evi-

dence seized following an arrest.

2. Alleged error in denying the motion to strike

evidence obtained as a result of an alleged unlawful entry into

appellant's apartment.

3. Alleged error in permitting improper evidence upon

rebuttal (Opening Brief of Appellant, p. 5).

IV

STATEMENT OF FACTS

On February 19, 1966, William Jones, also known as William Dale, was arrested at San Ysidro, California [R. T. 10, 13-14 29, 32]. On the previous day, Jones had gone from Los Angeles to Mexico with appellant in appellant's 1965 Cadillac automobile [R. T. 20, 29, 32]. Before they left Los Angeles, appellant agreed to give \$100 to Jones if he would bring a package back to the United States and deliver it to appellant in Los Angeles [R. T. 16, 29].

In Mexico appellant gave Jones a package and left [R. T. 28-29]. It was stipulated that a chemist would testify that the package contained approximately one ounce of cocaine [R. T. 13-15,

124-25].

After Jones entered the United States from Mexico as a pedestrian at San Ysidro on February 19, he was searched by officers. The package was found in his shorts [R. T. 10, 12, 14-15, 35].

Jones also had a small card containing a telephone number, 758-9794, and the name, "Johnny". Jones placed a telephone call to that number in Los Angeles, in the presence of officers at approximately 3:00 P. M. on February 20. Appellant answered the phone [R. T. 107-09].

Jones referred to the party at the other end as "Johnny", identified himself as "B. J." and said that he was still in San Diego and that he still had his thing. The party on the other end asked if Jones had any trouble getting through the line. Jones replied, "No", and the other party said, "Well, I had a little bit of trouble down there, but I'll tell you about that when I see you". Jones asked him if he was going to be home, and he replied, "Yes". Jones said, "All right; I'm on my way up. I'll see you in a little while." [R. T. 110-11].

After United States Customs Agent David W. Hopkins received information from other agents who had questioned Jones, he participated in the placing of a radio transmitter upon Jones. Then Jones and Customs officers proceeded to appellant's apartment in Los Angeles [R. T. 42, 44-45, 59, 111]. Jones was trying to assist the officers [R. T. 38-39].

Appellant heard a knock on the door. A lady friend

answered the knock and asked, "Who is it?" Jones replied, "B. J." Appellant told his friend to let him in, and she let Jones come into the apartment [R. T. 85-86].

Jones gave the package to appellant. Agent Hopkins listened to portions of the conversation by using the radio device [R. T. 21, 45]. He heard Jones' voice when he asked whether Johnny was in. A female voice replied, "Yes; just a minute". Agent Hopkins heard footsteps. He heard a male voice ask Jones whether he had any problems getting through the line. Jones replied that he had no trouble. There was conversation about the trip and how Jones got to Los Angeles [R. T. 46].

Part of the conversation was not audible to Agent Hopkins, but he heard conversation about a "package". He decided to enter the apartment:

"I knocked on the door, waited a few seconds, and no answer came from within, so I opened the unlocked door and came into the apartment." [R. T. 47]. It was approximately 7:30 P. M. on February 20, about five minutes after Jones entered the apartment [R. T. 43, 47]. The officers did not have a warrant [R. T. 56].

After the officers entered, Agent Hopkins and another officer both observed that appellant had his hand underneath the cushion of the couch upon which he was seated. Appellant and Jones were arrested. The arrest of Jones was for his own protection. Customs Port Investigator Honore looked underneath the cushion upon which appellant had been seated and found a rubber

contraceptive resembling the package that had been carried across the border by Jones [R. T. 50-52, 114-16].

The apartment was searched. A box containing small rubber balloons, rubber bands, and aluminum foil cut into squares was found in a closet. Another box with numerous small rubber balloons was found in the kitchen. About \$500 in cash was between the mattress and innersprings in the bedroom. Approximately 300 Dexamyl tablets were in a dresser drawer in the bedroom [R. T. 117].

Customs Port Investigator Donald R. Carter testified that in his opinion the aluminum foil squares were to be used to carry narcotics in five-milligram quantities. He testified that aluminum foil squares are generally used for cocaine. He also testified that many narcotic dealers use balloons and rubber bands to hold the narcotics. It was stipulated that Carter was an expert witness [R. T. 112, 114 118, 119].

Appellant's motion to suppress evidence was denied [R. T. 61-62].

Appellant testified that he had no agreement with Jones concerning the importation of cocaine, that he did not promise to give \$100 to Jones, and that he did not give Jones a package containing cocaine [R. T. 76-77, 90].

He testified that he went to Mexico with Jones to see the dog races, that he drove the car, and that Jones talked about narcotics and left him [R. T. 70-72].

Appellant also testified that he later grabbed a brick to

strike a suspicious-looking "Spanish fellow" "because he looked like he was going to jump on me", and the man pulled out a pistol and yelled "Policia", three times. Then, according to appellant, someone took him to the police station, where an officer "knocked me around", and attempted to take appellant's money, which amounted to approximately \$400 or \$500, before releasing him with his money [R. T. 73-74, 76].

Appellant also testified that he returned to Los Angeles; that he talked to Jones on the telephone; and that he had purchased the balloons for his son who resided elsewhere [R. T. 65-66, 76, 87, 122]. At one point he testified that he did not know what the aluminum foil squares (found with the balloons) were for. Later he testified that the "pieces of tinfoil", were used to prevent contact between carpets and furniture during his carpet-cleaning work [R. T. 95, 122-23].

V

ARGUMENT

A. THE OFFICERS HAD PROBABLE CAUSE TO ARREST APPELLANT.

Appellant contends that his motion to strike evidence should have been granted upon the ground that the officers did not have probable cause to arrest appellant. This argument involves evidence seized as the fruit of the search of appellant's apartment incident to his arrest.

The officers had a considerable quantity of information prior to the moment that Agent Hopkins made the entry into the apartment.

William Jones had been arrested after entering the United States from Mexico with a container of cocaine, a narcotic drug, in his shorts [R. T. 12, 13-15]. Customs officers found the contraband [R. T. 34-35]. After some delay, Jones told the officers that appellant had asked him to come down there and bring the package back [R. T. 36]. A card containing a telephone number and the name, "Johnny", was in the possession of Jones [R. T. 108-09].

At approximately 3 p.m. on February 20 (the following day), Jones dialed the telephone number that was on the card with the name, "Johnny". This was done in the presence of two Customs officers [R. T. 10-12, 108-09].

Appellant answered the phone. Jones referred to the other party as "Johnny", identified himself as "B. J.", and said "that he was still in San Diego and that he still had his thing, and the party on the other end asked if he had any trouble getting through the line". Jones replied that he did not, and the other party said, "Well, I had a little bit of trouble down there, but I'll tell you about that when I see you" [R. T. 110, emphasis added]. Jones asked the other party if he was going to be home and received the reply, "yes". Then Jones said, "All right; I'm on my way up. I'll see you in a little while." [R. T. 111].

Customs officers proceeded to appellant's apartment in Los Angeles after Customs Agent Hopkins received information from the other agents who had questioned Jones. A radio

transmitter was placed upon Jones, who was attempting to assist the officers [R. T. 38-39, 44-45, 59].

Jones knocked on the door of the apartment. Appellant told a friend to let him enter. Agent Hopkins, who was listening by using the radio device, had heard Jones' voice when he asked whether Johnny was in. He heard a female voice reply, "Yes, just a minute". He heard steps and heard a male voice asking, "Did you have any problems getting through the line?", or words to that effect. He heard Jones reply in the negative, and then there was the sound of music [R. T. 45-46, 85-86].

Agent Hopkins heard additional conversation about the trip and how Jones got to Los Angeles. Part of the conversation was not audible, but Agent Hopkins heard someone inside mention the word "package". He decided to enter the apartment. The loud music was interfering with the radio reception [R. T. 46-47].

It is respectfully submitted that Agent Hopkins had abundant probable cause for the arrest of appellant. Jones had stated that appellant had asked him to bring the package back. The package contained cocaine, a narcotic drug. The statements of Jones were corroborated by (1) his possession of appellant's telephone number with the name "Johnny"; (2) his call to that telephone number and conversation with a "Johnny" about "the thing"; (3) appellant's question as to whether Jones had any trouble getting "through the line" (obviously referring to the International boundary, the most dangerous point in a Mexico-Los Angeles narcotics trip); (4) appellant's statement to the effect that he, appellant, had been

"down there" (indicating that it was a very recent trip); (5) appellant's later question as to whether Jones had any problems "getting through the line" (overheard by use of the radio device); and (6) the mention of the word "package".

While all that was required was "'a reasonable ground for belief of guilt'", which means less than sufficient evidence to justify conviction, ^{3/} Agent Hopkins had far more than this.

In Rodgers v. United States, 267 F.2d 79 (9th Cir. 1959), Customs officers made an arrest of a woman in San Diego after acting upon information originally furnished by one Martinez who had been placed in custody after crossing the international boundary at San Ysidro. Martinez stated that the woman, E. Nadine Rodgers, would be waiting in San Diego and would have heroin that had been purchased in Tijuana. There were some corroborating features, including the false statement by Mr. Rodgers, who had a narcotics record and said that Mrs. Rodgers would not be in San Diego; the fact that Mrs. Rodgers was found in San Diego near the location described by Martinez; the fact that Martinez was a heroin user and knew some narcotics agents in San Francisco; and some other minor factors. This Court held that there was probable cause for the arrest of Mrs. Rodgers:

"Martinez, although unknown to the arresting officers at the time he was taken into custody and therefore unreliable, had by the time the arrest was made

^{3/} Rodgers v. United States, 267 F.2d 79, 85 (9th Cir. 1959).

proved to be reasonably reliable." (at p. 88).

Appellant cites Castillon v. United States, 298 F.2d 256 (9th Cir. 1962). In that case, the corroborating facts did not approach the level of the corroborating circumstances in the instant appeal.

In this case, as in Rodgers, supra, there was sufficient corroboration of the statements of the arrested person to "warrant a prudent man in believing that the offense has been committed". 4/ Indeed, no other conclusion would have been reasonable. In order to be falsifying, and in order to wrongfully set the stage for the incriminating telephone conversation, Jones would have had to be blessed with the gall of a carnival pitchman and the magic of a Merlin. A prudent man would have had no hesitation in reaching a sincere belief that appellant had committed a Federal offense.

B. THE QUESTION OF THE MEANS OF ENTRY INTO APPELLANT'S APARTMENT MAY NOT BE RAISED IN THIS APPEAL.

Appellant contends that the officers unlawfully entered his apartment by failing to state their authority and purpose and failing to await a refusal of admittance.

Appellant did not raise this issue in the trial Court as part

4/ The language is from Henry v. United States, 361 U.S. 98, 102 (1959).

of his motion to suppress evidence [R. T. 61-62] and did not raise the question at any time during the trial. Consequently, he is precluded from raising this new issue at this time.

Jones v. United States, 362 U.S. 257, 272 (1960);

United States v. Monticallos, 349 F.2d 80, 82

(2nd Cir. 1965);

Robinson v. United States, 327 F.2d 618, 623

(8th Cir. 1964).

In Robinson, supra, the appellant moved to suppress the evidence upon the claim that the evidence was unlawfully seized but did not raise the issue of alleged failure to make an announcement before entry. His later attempt to raise the new issue upon appeal was unsuccessful:

"The prosecution therefore was not challenged about the arrest, showed only such facts as led to the search, was under no necessity of offering evidence in justification and explanation of the entry, and in effect was lulled into an assumed security which the defense would now make false. We, of course, do not know from this record what the government would or could have proved by way of explanation and justification. We do feel that, under the circumstances of this case, the defense is not now in a position to complain by afterthought. If an arrest and the search and the discovery of evidence are to be challenged on appeal, that challenge must be made in the first instance in the trial court.

Fairness to that court and to counsel and to a reviewing court demands this. So do fair 'procedural requirements.' This presents no 'plain error' or Rule 52(b) situation for there may be no error at all. Somewhere the rights of the public and the rightful demands of orderly criminal procedure deserve protection, too."

Robinson, supra, at p. 623.

The essential logic of this rule readily appears in the light of the general rule to the effect that the burden rests upon the defendant to establish the fact that evidence was illegally obtained.

Addison v. United States, 317 F.2d 808, 812-13

(5th Cir. 1963), cert. den. 376 U.S. 905
(1964);

Wilson v. United States, 218 F.2d 754, 757

(10th Cir. 1955);

Jaraba v. United States, 158 F.2d 509, 513, note 3

(1st Cir. 1946).

If a party does not raise an issue in the trial court, it is very unlikely that he will satisfy the burden of proof.

C. ASSUMING ARGUENDO THAT APPELLANT MAY NOW RAISE THE NEW ISSUE OF ANNOUNCEMENT BEFORE ENTRY, THE ANNOUNCEMENT WAS NOT REQUIRED BECAUSE THERE WAS NO "BREAKING".

Assuming, for purposes of argument, that appellant may now raise the new question of the alleged failure of officers to make a proper announcement before entering the apartment to arrest appellant, the announcement rule does not apply because there was no "breaking". Agent Hopkins merely opened an unlocked door [R. T. 47].

Appellant cites Miller v. United States, 357 U.S. 301 (1958), and Wong Sun v. United States, 371 U.S. 471 (1963). Miller involved a Federal search warrant statute (18 U.S.C.A. 3109) which provided that an officer may "break open" ^{5/} a door under appropriate circumstances. Officers entered the apartment by ripping off the door chain which was holding the door (at pp. 303-04). In Wong Sun, it was stipulated "that the door was broken and splintered around the lock".

Wong Sun v. United States, 288 F.2d 366, 368,
note 1 (9th Cir. 1961), reversed,
371 U.S. 471.

This Court has held that where officers "simply opened an unlocked door and entered without objection" (after knocking and

^{5/} California Penal Code Section 844 uses the words, "break open the door", in connection with arrest procedures.

receiving no response), they "did not break any doors or in any other manner perpetrate a forceful entry". The Court also stated: "In the instant case there was no forceful entry as there was in Miller."

Williams v. United States, 273 F.2d 781, 793-94
(9th Cir. 1959), cert. den. 362 U.S. 951
(1960).

In United States v. Bowman, 137 F. Supp. 385 (C. A. D. C. 1956), officers entered an unlocked front door of a building for the purpose of serving a search warrant. The defendant maintained that the officers did not make the required announcement. The Court rejected the claim, holding that the officers did not "break open" the door and stating this proposition of law:

"So long as the entry is peaceful and there is no breaking of parts of the house, the execution of the search warrant is legal." (at p. 388).

Bowman is cited as authority in Ng Pui Yu v. United States, 352 F.2d 626, 632 (9th Cir. 1965), and Leahy v. United States, 272 F.2d 487, 489 (9th Cir. 1959), cert. dismissed, 364 U.S. 945 (1961). The conclusion that a peaceful entry does not constitute a breaking is fully consistent with the history of the announcement rule. The latter rule originated with the purpose of avoiding unnecessary injury to private property.

49 Cal. Law Review 474, 502-03 (1961).

It is self-evident that doors and locks would be unnecessarily

damaged by smashing through in order to make an arrest where a mere request might result in a permissive entry. However, the question of damage does not appear where the officer merely turns the doorknob. 6/

Bowman was not followed in the majority opinion in Keiningham v. United States, 287 F.2d 126 (C. A. D. C. 1960). In that case two circuit judges stated:

"We think that a person's right to privacy in his home (and the limitation of authority to a searching police officer) is governed by something more than the fortuitous circumstance of an unlocked door, and that the word 'break' as used in 18 U. S. C. § 1309, means 'enter without permission.' " (at p. 130).

However, the opinion does not consider the fact that the encroachment upon the right to privacy in the home resides in the authority to enter in order to make an arrest, not in the possibility of entering without making an announcement. By the time that the announcement becomes necessary, the absolute right to privacy in the home no longer exists, because the officers already have the right to enter in order to make an arrest. The language of the majority opinion in Keiningham was criticized by this Court in Ng Pui Yu, supra, at p. 632; is inconsistent with this Court's holding in Hopper v. United States, 267 F.2d 904, 908 (9th Cir. 1959) (in which the

6/ Although the announcement rule has been extended to include cases of entry through use of a key, it is questionable whether there should be additional extension of a rule that has been criticized as "a dangerous anachronism".

49 Cal. Law Review 474, 502 (1961).

entry was without permission and there was no refusal of admittance); and was discussed and not followed in United States v. Conti, 361 F.2d 153, 157 (2nd Cir. 1966), and United States v. Williams, 351 F.2d 475, 477, note 3 (6th Cir. 1965), cert. den. 383 U.S. 917 (1966).

D. ASSUMING ARGUENDO THAT THERE
 WAS A "BREAKING", APPELLANT'S
 CONSTITUTIONAL RIGHTS WERE NOT
 VIOLATED.

Since appellant did not raise the announcement issue in the trial Court, it is not surprising that there is no evidence to support the conclusion that the officers failed to state their authority and purpose before entering.

Appellant speculates that the officers did not make the announcement because Agent Hopkins, one of four officers who were at the door, did not mention such an announcement in his narrative of events [R. T. 47]. Such speculation cannot substitute for evidence.

Furthermore, there are two additional reasons for rejecting appellant's claim that the evidence should have been suppressed.

Exigent circumstances justified a prompt entry without waiting for appellant to open the door. In addition, the discovery of the evidence was not the "fruit" of the failure to make the announcement and await refusal of admittance.

In absence of an applicable Federal statute, state law is

controlling upon the question whether a proper procedure is employed before breaking open a door in order to make an arrest.

Williams v. United States, supra, at pp. 792-93;

Miller, supra, at pp. 305-06;

Ker v. California, 374 U.S. 23, 39 (1963);

Jackson v. United States, 354 F.2d 980, 981

(1st Cir. 1965).

Since there is no applicable Federal statute here, California Penal Code Section 844 is controlling.

Ker, supra, at pp. 37-39;

Williams, supra, at pp. 792-93.

Under Section 844, noncompliance with the announcement rule is permissible where exigent circumstances are present.

Ker, supra, at pp. 37-39;

Williams, supra, at p. 793.

A similar exception applies to 18 U.S.C.A. 3109 (the statute involved in Miller, supra).

Gilbert v. United States, 366 F.2d 923, 931-32

(9th Cir. 1966).

The exigent circumstances in the instant case included the severe risk to the cooperating defendant, Jones. Once the officers knocked and announced their purpose, it would have become obvious to appellant that Jones, who had entered a few minutes previously, was cooperating with the officers to set the stage for appellant's arrest. It was a distinct possibility that the suspect would attempt to take his revenge upon Jones while the officers were patiently

awaiting a refusal of admittance.

Retaliation upon informants is not a rare phenomenon. In Hurst v. United States, 344 F.2d 327 (9th Cir. 1965), this Court stated:

"That disclosure of an informant's name, particularly in a border-crossing case involving narcotics, can have grave consequences is a truism."

Another court has also considered the risks that an informant must take:

"The Court takes judicial knowledge of a number of informers that have appeared in his court who have been murdered or foully treated."

United States v. Estep, 151 F. Supp. 668, 673
(N. D. Texas 1957).

In the same opinion, the Court mentioned the murders of a number of Federal informants, accomplished by various means, including stabbing, machine gun fire, drowning, throat-cutting, and head-smashing.

As a result of the breakdown in the radio transmission, the officers were powerless to protect Jones unless they entered quickly, since they did not know what was happening inside. Having enlisted Jones as an ally in the fight against the narcotics traffic, the officers had a moral obligation to protect him. Consequently, they were not required to comply with the requirements of Section

844. Even the minority opinion in Ker, supra, recognized the need for prompt action where risks of bodily harm are present. After mentioning a possible exception in the case of escape and hot pursuit, the minority opinion added (at p. 55):

"But no exceptions have heretofore permitted unannounced entries in the absence of such awareness on the part of the occupants -- unless possibly where the officers are justified in the belief that someone within is in immediate danger of bodily harm." (Emphasis added).

Appellant notes that exigent circumstances may justify noncompliance with an announcement statute in some cases and that these circumstances include the necessity to aid one in peril. However, he states that Agent Hopkins entered because he was not getting good radio reception, not in order to avoid one of the problems involved in the exigent circumstances rule (Opening Brief of Appellant, p. 12). It is true that Agent Hopkins testified that they decided to enter because they were not getting good radio reception [R. T. 47]. However, this was merely one link in the chain of causation. He was not asked why the lack of radio reception created a necessity for entry. It is obvious that he did not enter in order to listen to the Sabbath-Jones conversation.

Furthermore, assuming arguendo that the method of entry was not excused by the existence of exigent circumstances, the evidence would be admissible, because the evidence was not the

"fruit" of the alleged illegality. Had the officers made an announcement and awaited a permissive entry or refusal of admittance, the evidence would have been seized. Jones was inside and could observe any attempt by appellant to hide the package.

" 'Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section 844.' "

Ker, supra, at p. 23.

The same rule appears in Williams, supra, at p. 793, and in People v. Carrillo, 64 Cal.2d 387, 391 (1966). Since the officers would have obtained the evidence anyway, the seizure was not the "fruit" of the manner of entry.

E. THE ADMISSION OF REBUTTAL
EVIDENCE DID NOT CONSTITUTE
ERROR.

Appellant maintains that the trial Court erroneously admitted improper rebuttal testimony regarding balloons and aluminum foil squares.

In the case in chief, Agent Hopkins testified that aluminum squares and small rubber balloons were found in two rooms in appellant's apartment [R. T. 60]. Appellant testified that the balloons were for his child [R. T. 65-66]. On cross-examination,

appellant testified that he did not know what the aluminum squares were for [R. T. 95]. Investigator Carter testified in rebuttal that balloons and aluminum foil squares were found in the same box and that in his opinion, the aluminum squares and balloons were to be used for narcotics. He testified that the aluminum squares are generally used for cocaine. It was stipulated that he was an expert [R. T. 114, 117-19].

The evidence in regard to the use of balloons was proper rebuttal evidence which served the function of impeaching appellant's claim that the balloons were for his child. The evidence relating to the use of the aluminum squares (which were found with the balloons, in the same box) was proper rebuttal evidence serving the purpose of impeaching appellant's previous testimony to the effect that he did not have the faintest idea what the aluminum squares were for [R. T. 95]. Appellant overlooks the latter testimony when he states:

"The defendant presented absolutely no evidence as to the use or purpose of the tinfoil squares

But with nothing having been said regarding the tinfoil squares, there was no basis to permit evidence on rebuttal regarding the squares."

(Opening Brief of Appellant, pp. 13-14).

Furthermore, appellant failed to object to the rebuttal testimony in a timely fashion. No objection was made until the conclusion of a ten-minute recess which followed the conclusion

of the witness' testimony and the release of the witness. Appellant's counsel then made a motion to strike all of the testimony of the witness as improper rebuttal [R. T. 118, 120].

"An objection to the introduction of testimony must be made at the earliest possible opportunity after the objection becomes apparent or it will be held to have been waived."

88 C. J. S., p. 237.

This rule has been applied to the objection that evidence is improper rebuttal.

88 C. J. S., p. 241.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment in the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson
PHILLIP W. JOHNSON

NO. 21474

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES E. LOFLAND,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN K. VAN de KAMP,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROBERT M. TALCOTT,
Assistant U. S. Attorney,

FILED

APR 6 1967

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

WM. B. LUCK, CLERK Attorneys for Appellee,
United States of America.

APR 7 1967



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Chief, Criminal Division,

ROBERT M. TALCOTT,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES E. LOFLAND,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTION

This is an appeal from an order of the United States District Court for the Central District of California, entered September 12, 1966, denying appellant's motion to vacate and set aside his sentence, judgment, and indictment under the provisions of Title 28, U.S.C., Section 2255 [T.R. p. 13]. 1/

The jurisdiction of the District Court rested on Title 18, U.S.C. Sections 2315 and 1343 and Title 28, U.S.C. Section 2255.

This Court has jurisdiction to review the judgment of the District Court denying appellant's "2255 Motion", pursuant to Title 28, U.S.C. Sections 1291 and 1294.

1/ "T.R." refers to Clerk's Transcript of Record.

II

STATUTE INVOLVED

Title 28, United States Code, Section 2255 provides as follows:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issue and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional

rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. "

III

STATEMENT OF THE CASE

On September 23, 1964, a five count Indictment was returned by the Grand Jury for the Southern District of California charging appellant in four counts with violation of Title 18, United

States Code, Section 1343, wire fraud and Section 2315, sale and receipt of stolen securities [T. R. p. 31]. On October 12, 1964, appellant represented by retained counsel, Thomas W. Lefner, was arraigned before the Honorable Albert L. Stephens. At that time the defendant entered a plea of not guilty. On February 25, 1965, after a court trial before the Honorable Jesse W. Curtis, the appellant was found guilty on all five counts. On April 12, 1965, appellant was sentenced to the custody of the Attorney General for a period of ten years.

On April 22, 1965, appellant filed a timely notice of appeal [T. R. p. 37]. On April 28, 1965, appellant filed an application for leave to appeal in forma pauperis. In the application the appellant made no request for the appointment of counsel. The application was signed by appellant [T. R. p. 39]. On April 29, 1965, the District Court entered an order permitting appellant to appeal in forma pauperis. The appellant thereafter designated the transcript of record on appeal with the notation that he was appearing in propria persona. On October 14, 1965, appellant's trial counsel, Mr. Thomas Lefner, wrote the Court of Appeals informing this Court that he was acting for appellant as an accommodation and that appellant was appearing pro se. At the time appellant filed his brief, appellant wrote this Court requesting that counsel be appointed to argue his case, or that he be given leave to appeal to argue the case. The appellant reiterated that his brief was filed in pro per. This Court responded by appointing Mr. Lefner to argue the case for appellant and he did so on

February 2, 1966. On March 8, 1966, this Court affirmed the judgment of conviction of the District Court [357 F.2d 472]. In this Court's opinion, it was noted at page 476 that appellant had appealed in propria persona. On April 7, 1966, appellant filed a motion for rehearing before this Court. For the first time, appellant alleged as grounds for the rehearing that he "was denied competent counsel to prepare his brief." On June 6, 1966, this Court denied appellant's request for rehearing.

On June 30, 1966, the appellant petitioned for a writ of certiorari before the Supreme Court of the United States. On January 16, 1967, the petition was denied.

On September 8, 1966, appellant filed the instant Section 2255 motion claiming he was "deprived of his right to counsel on appeal." On September 12, 1966, the District Court denied the appellant's motion, stating:

"The record before this court shows that the petitioner was represented at the time of plea, during the trial, and at the time of sentence by an attorney, and further indicates that the appeal was taken in propria persona. There is no record or indication of any kind that the defendant at any time requested the appointment of an attorney to represent him on appeal, at least in so far as this court is concerned."

On October 7, 1966, the District Court denied appellant's motion for a rehearing [T.R. pp. 18-19]. It is from the denial of

the September 12, 1966 motion that the present appeal stems.

IV

ARGUMENT

THERE IS NO ERROR IN THE COURT'S FAILURE
TO APPOINT COUNSEL ON APPEAL WHEN
NO REQUEST FOR COUNSEL WAS MADE BY
APPELLANT.

The provisions of Title 28, Section 1915(d) proceedings in forma pauperis, state that "the court may request an attorney to represent any such person unable to employ counsel. . . . " This sentence has not been construed to require the trial or appellate courts to appoint an attorney on appeal in the absence of a request for assistance by the appellant.

Appellant at no time requested assistance of counsel to perfect and prepare his appellate brief. On the one occasion that counsel was requested by appellant to argue the appeal this Court immediately requested appellant's trial counsel to assume that responsibility.

To hold it error not to appoint counsel never asked for would create automatic grounds for appeal in every criminal case. Such has never been the rule.

Tucker v. United States (C. A. 9, 1962),

308 F.2d 798, 802, citing, Thompson v.

Johnson (C. A. 9, 1947), 160 F.2d 374; and

Brown v. Johnson (C. A. 9, 1942), 126 F.2d 727.

An examination of the record in this case fails to disclose any request prior to the filing of appellant's brief for an attorney. On the contrary, the record does reflect that at all times the appellant was acting in propria persona. The notice of appeal was filed by appellant, the designation of record was signed by appellant appearing pro per, the appellant's brief, filed in his name made numerous references as to his own representation; the Court of Appeals in its opinion affirming the conviction also noted appellant had appealed in propria persona.

The cases discussed by appellant concerning right to counsel at the trial level can not be applied to the appellate procedure. As stated in Pate v. Holman (C. A. 5, 1965), 341 F.2d 764 at p. 773:

"The right to counsel on appeal stands on a different footing, not only constitutionally but as a practical matter, from the right to counsel during earlier stages of a criminal proceeding. An appeal is not a prerequisite to the execution of a sentence, whereas the proceeding leading up to and including a judgment are such a prerequisite. The right to a fair trial is primary and fundamental. A right of review is secondary, and exists only as an added safeguard against denial of the primary right. The obligation of the state to see that the defendant receives a fair trial is absolute; to provide him an appellate review is optional. That due process compels the court affirmatively to advise a defendant

of his right to counsel at the trial stage does not
lead to a conclusion that he must also be advised
at the appellate stage." (Emphasis added.)

Thus, in the absence of a request for counsel on appeal the court is not obliged either to initiate an inquiry concerning counsel or to extend an invitation to appellant to have an attorney appointed.

V

CONCLUSION

The District Court did not err in denying appellant's Section 2255 motion on the grounds set forth above and its judgment should be affirmed.

Respectfully submitted,

JOHN K. VAN de KAMP,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROBERT M. TALCOTT,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert M. Talcott

ROBERT M. TALCOTT
Assistant U. S. Attorney

No. 21,522

See Vol. 3399

In the

United States Court of Appeals

For the Ninth Circuit

FEB 24 1969

R. G. SMITH, doing business under the name
and style of TA'RON, INC., and INTERNA-
TIONAL FRAGRANCES, INC.,

Appellants,

vs.

CHANEL, INC. and CHANEL INDUSTRIES, INC.,

Appellees.

**Petition for Rehearing and Suggestion for Rehearing
in Banc Filed by Petitioners Chanel, Inc. and
Chanel Industries, Inc.**

FILED

ROBERT E. ZANG

961 Mills Tower
San Francisco, California 94104

NOV 4 1968
WM. B. LUCK, CLERK

DIRKS B. FOSTER

44 Montgomery Street
San Francisco, California 94104

*Attorneys for Petitioners
Chanel Inc. and
Chanel Industries, Inc.*

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SUGGESTION FOR REHEARING IN BANC

Pursuant to Rule 35(b), Federal Rules of Appellate Procedure, Petitioners suggest the appropriateness of rehearing this matter in banc. Such appropriateness is based on the important questions involved in this proceeding in the areas of trademark protection and unfair competition namely, whether a valid trademark can be appropriated and exploited by a competitor in connection with the promotion and sale of the competitor's product or whether such action infringes the trademark or constitutes unfair competition. The decision of the Court poses a grave danger to the

trademark system as it exists today, and it would be unfortunate if the doctrine articulated in the Court's opinion took root as a result of the decision.

PETITION FOR REHEARING

Petitioners respectfully submit that the decision of the Court seriously misconceives the character and extent of the protection afforded the owner of a valid trademark under our trademark system. The Court's decision approves and ratifies the appellants' exploitation of petitioners' trademark "Chanel No. 5" on the purported basis of the public interest and the encouragement of competition. Petitioners believe that such exploitation cannot be justified on any valid basis in law and that the effect of the decision of the Court is in fact to erode the public interest in the continued vitality of the trademark system and the encouragement of *fair* competition as distinguished from unfair competition.

In essence, this Court has held that one who attempts to copy a product sold under a trademark may use such trademark in his advertising to try and sell his own goods, so long as the advertising copy does not misrepresent or is not likely to confuse purchasers as to the origin or sponsorship of the alleged duplicate.¹ In practical effect no relief will be accorded the trademark owner under these circumstances on the basis of possible dilution of the value of the trademark or possible damage that may result from such exploitation of the trademark by the copier—the copier is thus free to capitalize upon the selling power of "Chanel No. 5". This rule is said to rest on the premise that the only legally relevant function of a trademark is to impart information as to the source or sponsorship of the product.

Ownership of a trademark affords certain protections which have important legal consequences for the owner as well as for

1. The District Court in enjoining this form of advertising considered it be an attempt "to take a free ride on plaintiffs' widespread goodwill and reputation". *Finding of Fact XI*.

the consuming public. It has long been recognized that the trademark area involves the balancing of competing interests—that of the purchaser concerned with obtaining cheaper copies of well known goods; that of the copier who seeks entry into the market through such techniques; that of the purchaser concerned with obtaining “quality” for his money by reliance on trademarked goods; and that of the producer of such quality goods who through long effort and considerable expenditure has acquired a widespread reputation for quality and has earned the right to enjoy the benefits resulting from such reputation free from the parasitic efforts of copiers purportedly selling “equivalent” goods through the use of the very trademark that is the originator’s symbol of quality. No one has stated it more incisively than Mr. Justice Frankfurter:

“The protection of trade-marks is the law’s recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress.”

Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 205 (1942)

It is apparent that the District Court decision in this case was grounded in the recognition of the economic value of the Chanel trademark—a value that was deemed entitled to protection. Whether appellants’ use of the mark be considered as a “free

ride" or an attempt at "palming off", e.g. *Harold F. Ritchie Inc. v. Chesebrough-Ponds Inc.*, 281 F.2d 755 (2d Cir. 1960), it is the protection of the trademark from objectionable exploitation by another that is involved—a protection that the District Court afforded in this case and which this Court should recognize and affirm.

The opinion of this Court holding that the advertising involved in this case may not be enjoined, notes the absence of any contrary holdings by Federal or California appellate courts. There is in fact no dearth of case law in this area and the cases though not controlling reflect the courts' awareness of the problems posed by the "commercial hitchhiker" and are significant in evidencing the relief that has been afforded in this area. In *Winthrop Chemical Co. v. Blackman*, 246 App. Div. 234, 285 N.Y.S. 443 (1936) the defendant was enjoined from advertising its drug by the use of plaintiff's trademarks and such phrases as "equivalent to" and "introduced as", the Court concluding that the practice was designed to foist the defendant's product on the buyer.

In *Anheuser-Busch Inc. v. Niles*, 126 U.S.P.Q. 466 (N.D.Ill. 1960), plaintiff's slogan and trademark "where there's life . . . there's Bud" was protected by enjoining the use by defendant of "where there's life . . . there's bugs" in connection with the marketing of a floor wax and insecticide combination, the court holding that plaintiff's slogan and trademark would be diluted and impaired and the goodwill associated therewith disparaged and degraded. See also *Anheuser-Busch Inc. v. Chemical Corp. of America*, 126 U.S.P.Q. 464 (ND Fla. 1960), aff'd 306 Fed.2d 433 (5th Cir. 1962).

Metropolitan Opera Association, Inc. v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483, aff'd 279 App. Div. 632, 107 N.Y.S.2d 705 (1951) was a "record pirating" case, that involved *inter alia*, the exploitation of plaintiff's name. Aside from the danger to plaintiff's reputation and goodwill and to the sale of authorized metropolitan opera recordings posed by

the inferior quality of defendant's transcriptions, the Court recognized that involved in the case was defendant's trading on and appropriating the *value* of plaintiff's name and reputation. In discussing the extension of relief beyond the "palming off" situation the Court stated:

"With the passage of those simple and halcyon days when the chief business malpractice was "palming off" and with the development of more complex business relationships and, unfortunately, malpractices, many courts, including the courts of this state, extended the doctrine of unfair competition beyond the cases of "palming off". The extension resulted in the granting of relief in cases where there was no fraud on the public, but only a misappropriation for the commercial advantage of one person of a benefit or 'property right' belonging to another". 101 N.Y.S.2d 489

In *Fonotipia Limited v. Bradley*, 171 F. 951 (C.C.E.D.N.Y. 1909), also involving duplication of musical performances and use of plaintiff's name to publicize that fact, the court stated:

"It cannot now be determined how far such appropriation of ideas can be prevented; but it would seem that where a product is placed upon the market, under advertisement and statement that the substitute or imitating product is duplicate of the original, *and where the commercial value of the imitation lies in the fact that it takes advantage of and appropriates to itself the commercial qualities, reputation, and salable properties of the original, equity should grant relief.*" 171 F. 964 (emphasis supplied)

In *Flexitized Inc. v. National Flexitized Corp.* 335 F.2d 774 (2nd Cir. 1964) the Court of Appeals for the Second Circuit held that state law rather than Federal governed the claim of unfair competition there involved. It further held that defendant's use of "Flexitized", nevertheless constituted unfair competition under the law of New York, even though plaintiff's trademark was deemed invalid. The Court stated:

"Relief against unfair competition in cases like this is no longer limited in New York to situations where secondary meaning has been established so that a defendant can be charged with passing off his goods as those of another but rather, as a result of doctrinal development in the wake of the United States Supreme Court's classic decision in *International News Service v. Associated Press*, 248 U. S. 215 39 S. Ct. 68, 63 L. Ed 211 (1918), relief has been granted in New York in a wide variety of situations to insure that 'one may not misappropriate the results of the skill, expenditures and labors of a competitor.'" 335 F.2d 781 (citations omitted).

Finally, in California, Unfair Competition is defined in Civil Code, Section 3369 as including unlawful, *unfair* or fraudulent business practice and *unfair*, untrue or misleading advertising. In *Metro-Goldwyn-Mayer, Inc. v. Lee*, 212 C.A.2d 23 (1963) defendants sought to exploit plaintiff's film title "the Wonderful World of the Brothers Grimm" by use of a variation of the key words. In addition to holding defendant's advertising misleading, the Court stated:

"A second basis for the decision rendered by the trial court is set out in the statute, to wit: Use of the advertising slogan employed here is manifestly unfair to the plaintiff. Both plaintiff and defendant concur in view that extensive prerelease publicity is an economic necessity in the film industry. To permit defendants to describe their picture as they have done here allows trading on plaintiffs' expenditure of time, money and effort in securing the necessary advance interest in their film and causes a dilution of the interest generated by those efforts. In other words, it permits diversion of trade to defendants' film at the expense of plaintiffs' efforts by virtue of public confusion arising from defendants' misleading advertisements. "'Advertisements stating or suggesting that the one advertising possesses the good will of one well known in business, when such is not the fact, constitutes unfair competition.'" (Hoover Co. v. Groger, 12 Cal.App.2d 417, 420). This rationale is equally applicable where defend-

ant seeks to take advantage of public desire to see the subject film which has been created by plaintiff's publicity campaign." (212 C.A.2d 29)

It is respectfully submitted that this Court has misread the rule of *Saxlehner v. Wagner*, 216 U.S. 375 (1910), which case involved *only* the defendant's use of "Hunyadi" on its artificial bitter water.² Following the principle of *Singer v. June*, 163 U.S. 169 (1896), that descriptive terms or the name by which a product has become known (even if once an arbitrary or personal name) may be used in connection with copies of the product, the Supreme Court held the defendant entitled to use the descriptive and geographical term, "Hunyadi". In other words, the "goodwill of the goods" includes the right to use the name; it is inseparable from the right to copy the goods.

But Mr. Justice Holmes conditioned the use of the name on the defendant's properly guarding against deception in order that he not also use the "goodwill of the name", i.e., "such trademark or trade name as she (the plaintiff) may have" (216 U.S. at 380).

When the following year, the Supreme Court heard *Jacobs v. Beecham*, 221 U.S. 263 (1911), a similar case except that the designation "Beecham's" had *only* trademark significance ("It had not left the originator, to travel with the goods", 221 U.S. at 272), Mr. Justice Holmes confirmed the right to copy the product but denied the right to use the trademark even though the copier gave notice of his manufacture.

The rule is: A copier may use the name or description of the goods in connection with his copy, but he may not use the originator's trademark, even though he explains his responsibility for the copy. Since the record is devoid of any evidence that "Chanel No. 5" has any significance other than as a trademark (i.e., it describes only origin in Petitioner), Appellant was properly en-

2. The use of "Janos" was not in issue, it had been dropped by the defendant before suit (216 U.S. at 377, 380) and the court below indicated there was "no trademark shown" (157 F. at 749).

joined from using it. There simply is not any "goodwill of the goods" available for Defendant's use.

The case of *Viavi Co. v. Vimedia Co.*, 245 F. 289 (8th Cir., 1917) is either properly based on *Saxlehner*, in that there was insignificant use of the trademark by the copier (the case is silent as to the descriptive significance of the mark as the infringement claim was abandoned), or the 8th Circuit fell into the same error to which Appellant has led this Court. Similarly, the holding in *Societe Comptoir de L'Industrie Cotonniere Etablissements Bous-sac v. Alexander's Department Stores, Inc.*, 299 F.2d 33 (2d Cir., 1962) (which was not based on *Saxlehner*) either was influenced by the fact that the trademark owner had licensed others (perhaps improperly) to copy its designs and use its trademark so that it did not have exclusive use, or it conflicts with the *Saxlehner* rule.

Assuming the latter, if the lower ethical standards of the *Societe Comptoir* ruling are to govern the current market place, this Court is earnestly solicited to consider Mr. Justice Holmes' Maxim: *Corruptio Optimi pessima* (*Jacobs*, 221 U.S. at 271), and to foster a current pronouncement of the rule in the Supreme Court by rendering a decision on rehearing in conflict with *Societe Comptoir*.³ Implicit in the current holding of this Court is that all trademarks are descriptive and, therefore, may be used by competitors with impunity.

The danger that a trademark may lose its distinctiveness and become available for use by all as a generic or descriptive term most often arises as a result of the success of the mark itself—the more successful the mark the greater appeal it possesses for competitors. If competitors may freely use another's registered mark—avoiding only confusion as to the source of the goods—

3. In *Trail Chevrolet, Inc. v. General Motors Corp.*, 381 F.2d 353 (5th Cir., 1967) also cited by the Court, use of the trademark in connection with other than the authentic product was prohibited. The "refill fits" cases like *American-Marietta Co. v. Krigsman*, 275 F.2d 287 (2d Cir., 1960) do not involve use of a trademark to describe a product but to indicate the destination or use of a product.

may not a mark lose its distinctiveness and become generic, not because of any conduct of the trademark proprietor, but because of the license to poach granted to his competitors? While that is precisely the danger posed by appellants' use of "Chanel No. 5" in this case, the Court in its opinion has accorded little weight to this argument, stating that the Appellants do not use the mark as a generic term but employ it "only to describe Appellees' product not to identify their own."

The difficulty with this conclusion is that it contravenes what Appellants are actually attempting to accomplish by their advertisement and also what they contend has *already* occurred with respect to Petitioners' trademarks. First, it is difficult to view the advertisement involved herein as merely an attempt to use Petitioners' mark to describe Petitioners' product. By claiming 100% exact duplication, Appellants are in fact using the mark to describe and enhance their *own* product or else there is no point in using the mark or making the claim at all.! It is the very essence of comparative advertising. Second, in *Bristol-Myers Co. v. R. H. Macy & Co., Inc.*, 151 F. Supp. 513 (S.D.N.Y. 1957) the Court held defendant to have diluted the distinctive quality of plaintiff's trademark "Bufferin" by attempting to render it generic and descriptive via comparative advertising. That is precisely what is involved in the instant case. Appellants have been more than candid as to their real objectives in this case—they mean to destroy the value of Petitioners' trademarks. In the answer filed to Petitioners' complaint Appellants have alleged that "Chanel No. 5" and "No. 5" do not have a secondary and distinctive trademark meaning to the public but are generic expressions. In their counterclaim they allege that the marks have "become and are the common descriptive name of a fragrance and scent" and that each mark is in fact a generic name. They further seek to have the Court formally invalidate the trademarks.

In the light of these contentions it should be obvious that the thrust of Appellants' advertisement is the use of "Chanel No. 5"

as a generic term to describe their own scent. It is also apparent that their use of Petitioners' trademark in the advertisement poses the very threat they seek to consummate. Certainly the District Court in its Findings determined that the threat was real and the Petitioners' marks entitled to protection. That finding ought not to be now overturned by this Court on the basis that the danger is "slight" and outweighed by the maintenance of "effective competition"—unless "effective competition" is to be read as unprincipled competition.

In the interest of "promoting" competition, this Court has in effect given the green light to "piggy-back" or comparative advertising of the type involved here. We submit this was unwarranted in the light of the facts and the real danger to *fair* competition posed by Appellants' actions. What has been overlooked is that it is *Appellants* who have refused to enter the competitive market place with a product sold on the basis of its own merit. Rather than compete they have tried to take and exploit for themselves the good will and reputation that Petitioners have created through the expenditure of considerable time, money and merchandising skill. This we say they should not be allowed to do. Put another way, hundreds of other perfumes, colognes and toilet preparations have come on the market to compete with "Chanel No. 5". They have not found it necessary to describe their scents by resort to Chanel's trademark. The District Court held that Appellants should be compelled to market their product in the same manner. This Court should affirm. Petitioners therefore pray for a rehearing.

Respectfully submitted,

ROBERT E. ZANG
DIRKS B. FOSTER

*Attorneys for Petitioners
Chanel Inc. and
Chanel Industries, Inc.*

NO. 21593 ✓

See Vol 3401

FEB 26 1992

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of

TITLE INSURANCE AND TRUST COMPANY,
SAN BERNARDINO COUNTY, CALIFORNIA,
and THE INTERNATIONAL COMPANY, a
partnership composed of DAVID
SALYER, CHARLES L. GOLDING and
HENRY DYE,

Appellants,

vs.

WILLIAM G. FOWLER, as Trustee of
GUARANTY TRUST DEED CORPORATION,
Debtor, in Reorganization Pro-
ceedings Under Chapter X of the
Act of Congress Relating to
Bankruptcy,

Appellee.

Appeal from the United States District Court for the
Central District of California

PETITION FOR REHEARING and
MEMORANDUM OF POINTS AND AUTHORITIES

WELBURN S. MAYOCK
215 West 7th Street
Los Angeles, Calif. 90014
626-8619
Attorney for Appellee

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of

TITLE INSURANCE AND TRUST COMPANY,
SAN BERNARDINO COUNTY, CALIFORNIA,
and THE INTERNATIONAL COMPANY, a
partnership composed of DAVID
CALVER, CHARLES L. ROLDING and
BENNY DYE,

Appellants.

vs.

WILLIAM G. FOWLER, as Trustee of
GUARANTY TRUST BLDG CORPORATION,
Debtor, In Reorganization Pro-
ceedings Under Chapter X of the
Act of Congress Relating to
Bankruptcy.

Appellee.

Appeal from the United States District Court for the
Central District of California

PETITION FOR REHEARING

The appellee above named respectfully petitions this
honorable Court for a rehearing of the appeal in the above
entitled case and in support of this petition represents to
the Court as follows:

This petition is addressed to those features of the decision wherein it is believed that the court may be convinced that its result is based upon the application of incorrect legal principles.

The Court has permitted appellants to ignore the requirements of Title 11, U.S.C. Sec. 87(c) under which a party must first exhaust his remedy below by filing a petition for review by a Judge of the United States District Court and appeal directly to the United States Court of Appeals.

Appellants perpetrated a fraud on this Honorable Court by asserting that a petition for review had been filed when the Transcript of Record, containing all of the pleadings related to this matter demonstrates the fact that no such document was ever filed. Moreover, if a petition for review had indeed been filed, a Certificate of Review would have been filed by the Referee in Bankruptcy pursuant to Rule 204, Rules of the U. S. District Court for the Central District of California And a hearing held before the Honorable Jesse Curtis, the judge assigned to this particular bankruptcy matter. No such certificate was filed nor was any hearing held.

Appellants assertion that this Honorable Court had jurisdiction under Title 28, U.S.C. Section 1291 is patently false since there has never been a final decision in the court below.

The court erred in its determination that the appellant

buyers repudiated their contract on October 7, 1984, the last day before the performance date. Trustee's Exhibit G-1, which is part of the Transcript of Record, is a photocopy of a letter dated October 7, 1984 from The International Company to Title Insurance and Trust Company. The letter bears a receipt stamp of October 8, 1984. The law is well established that notification of rejection, repudiation or revocation of a contract is only effected when actual notice is received, not when the repudiation, rejection or revocation letter is composed, or even when such letter is posted. The repudiation of the contract and the purported rejection of title by the Appellant buyers took place when Title Insurance and Trust Company received actual notice thereof which, according to the receipt stamp on Exhibit G-1, was October 8, 1984. This was the day after the performance date and too late. Any so called rejection of title must necessarily have been timely to preserve any rights of appellants.

The court erred in its determination that the conflict in the evidence as to whether there were oral objections to title were not resolved by the Deferas. The Findings of Fact (F712) stating that The International Company without cause repudiated its contract to purchase the property and failed to comply with the escrow instructions and that Guaranty Trust Deed Corporation fully complied with the terms of the contract and the escrow instructions is the resolution of any such conflict. Where there is substantial

evidence to support it, this Honorable Court is bound by the
factual determination of the trier of fact.

For the foregoing reasons, this petition for rehearing
should be granted.

Dated: February 7, 1969.

Respectfully submitted,

WILLIAM G. FOWLER, Trustee
of GUARANTY TRUST BRED
CORPORATION

By Welburn S. Mayo
WELBURN S. MAYO
his Attorney

Appellee

MEMORANDUM OF POINTS AND AUTHORITIES

1. The decision ignores the requirements of Title 11, U.S.C. Sec. 67(e) which holds that a party must exhaust his administrative remedy prior to appeal from the courts.

The record demonstrates that no petition for review was filed. The assertion of appellants to the contrary is false. The record shows no such petition for review and no certificate of review, both of which would have been necessary pursuant to Rule 704, Rules of the U. S. District Court for the Central District of California. No such certificate was filed or any hearing held.

Appellants assertion that the Honorable Court had jurisdiction under Title 28, U.S.C. §1291 is untrue. There is not now nor has there ever been a final decision in the court below. Jurisdiction to hear the appeal cannot be affirmed by the false assertion that administrative remedies have been complied with.

2. The court relied upon Exhibit C-1 as the basis of its ruling and judgment on appeal deducing from this exhibit that appellants had made a timely repudiation of its contract to purchase as set forth in the escrow instructions.

In re notice:

As to the matter of notice, it may be said that where a statute requires notice and does not specify how it shall be given, the presumption is that personal service is required.

Stockton Automobile Co. v. Cenfer, 134 Cal 402

It may be broadly stated that where a statute or contract requires the giving of notice and there is nothing in the context or circumstances to show that any other form of notice was intended, personal notice is required. This is true because the law always favors a personal notice; it countenances substituted and constructive notices only as a matter of necessity or of extreme expediency.

70 Cal Jur, Sec. 11, page 243

It is true that personal notice can be given by mailing in which event proof that it was received must be made and notice is effective upon the delivery and becomes personal service upon such delivery.

Meinlen v. Neilbron, 24 Cal 836

The delivery of notice through the personal agency the sender selects could be an express company, a messenger service or the postal service. When any of these methods are used, it is the receipt of the document and not the date of its transmittal that constitutes the personal service required.

Meinlen v. Neilbron, 24 Cal 836, cited supra

The proof of service here is Exhibit G-1. It shows that it is a photocopy of a letter dated October 7, 1964. No mailing date is given. The exhibit, however, bears a receipt stamp of October 9, 1964. This is the only evidence before the Court as to the date of receipt. This shows it was

received on October 2, 1964. This shows it was effective as notice two days late and constitutes no notice at all of repudiation because the act under the contract which the notice purports to repudiate should have been performed by the appellants two days before their personal service became effective.

3. In re conflict of evidence

It is urged that the conflict of evidence upon which the court based its ruling was not resolved. The court failed to take into consideration the findings of fact and conclusions of law of the Referee. Here the conflict was resolved and such resolution is binding upon the Appellate Court. Upon proper deduction of such findings of fact, it shows that the International Company sought to repudiate its contract to purchase the property by notice of repudiation. The evidence shows that no legal notice of repudiation was given. The findings show that Guaranty Trust Seed Corporation fully complied with the terms of the contract and the above instructions.

The errors above shown require a rehearing and an ultimate dismissal of the appeal.

Respectfully submitted,

WILLIAM G. FOWLER, Trustee
of GUARANTY TRUST SEED
CORPORATION

By Malburn E. Hayock
WILLIAM E. HAYOCK
His Attorney

Appellee

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 20 1939

D. CLIFFORD CRUMMEY and ETHEL ELIZABETH CRUMMEY,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

COMMISSIONER OF INTERNAL REVENUE,

Petitioner

v.

D. CLIFFORD CRUMMEY and ETHEL ELIZABETH CRUMMEY,

Respondents

ON PETITIONS FOR REVIEW OF THE DECISIONS
OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE COMMISSIONER

RICHARD C. PUGH,
Acting Assistant Attorney General.

MEYER ROTHWACKS,
DAVID O. WALTER,
STUART A. SMITH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

FILED

JUL 24 1937

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21,⁶⁰⁷~~067~~

D. CLIFFORD CRUMMEY and ETHEL ELIZABETH CRUMMEY,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

No. 21,607-A

COMMISSIONER OF INTERNAL REVENUE,

Petitioner

v.

D. CLIFFORD CRUMMEY and ETHEL ELIZABETH CRUMMEY,

Respondents

ON PETITIONS FOR REVIEW OF THE DECISIONS
OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE COMMISSIONER

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 65-81)
are not officially reported.

JURISDICTION

The cross-petitions for review in this case involve deficiencies in gift taxes for the years 1962 and 1963 in the original total amount of \$3,857.54. On August 13, 1964, the Commissioner of Internal Revenue mailed notices of deficiencies to the taxpayers. (R. 5-8, 16-20.) Within ninety days thereafter, on September 25, 1964, the taxpayers filed timely petitions with the Tax Court for a redetermination of those deficiencies under Section 6213 of the Internal Revenue Code of 1954. (R. 1-3, 12-14.) The decisions of the Tax Court were entered on August 23, 1966. (R. 87, 93.) Taxpayers petitioned for review by this Court on November 10, 1966. (R. 96-100.) The Commissioner of Internal Revenue cross-petitioned for review by this Court on December 16, 1966. (R. 107-109.) Both taxpayers' petition and the Commissioner's cross-petition were filed within the three-month and four-month periods prescribed by Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTIONS PRESENTED

1. Whether the Tax Court correctly held that, in the absence of an appointed guardian, transfers in trust for the benefit of 11 and 15-year old minors were not present interests and therefore could not qualify for the gift tax exclusion of Section 2503(b), Internal Revenue Code of 1954, where the trust provided that minor beneficiaries could only demand a fixed amount of corpus through a guardian.

2. Whether the Tax Court erred in holding that under the same terms and circumstances of the above-mentioned trust, transfers for the benefit of a 20-year old minor were present interests and did qualify for the gift tax exclusion of Section 2503(b) of the 1954 Code.

STATUTES INVOLVED

The statutes are set out in the Appendix, infra.

STATEMENT

The facts found by the Tax Court (R. 66-70), all of which were stipulated, are as follows:

Taxpayers are husband and wife residing in San Francisco, California. They filed separate federal gift tax returns for the calendar years 1962 and 1963 with the District Director of Internal Revenue at San Francisco, California. (R. 66.)

On February 12, 1962, taxpayers executed, as grantors, an irrevocable inter vivos trust, for the benefit of their four children. Their names, dates of birth, and ages during the years in question are as follows (R. 66):

<u>Child</u>	<u>Birth Date</u>	<u>Age on 12/31/62</u>	<u>Age on 12/31/63</u>
John Knowles Crummey	February 1, 1940	22	23
Janet Sheldon Crummey	June 21, 1942	20	21
David Clarke Crummey	June 6, 1947	15	16
Mark Clifford Crummey	February 20, 1951	11	12

Paragraph "ONE" of the trust required the trustee to hold the property in equal shares for the children of the grantors. Paragraph

"TWO" stated that the trust agreement was to be irrevocable. (R. 66.)

Paragraph "THREE" read as follows (R. 67):

THREE. Additions. The Trustee may receive any other real or personal property from the Trustors (or either of them) or from any other person or persons, by lifetime gift, under a Will or Trust or from any other source. Such property will be held by the Trustee subject to the terms of this Agreement. A donor may designate or allocate all of his gift to one or more Trusts, or in stated amounts to different Trusts. If the donor does not specifically designate what amount of his gift is to augment each Trust, the Trustee shall divide such gift equally between the Trusts then existing, established by this Agreement. The Trustee agrees, if he accepts such additions, to hold and manage such additions in trust for the uses and in the manner set forth herein. With respect to such additions, each child of the Trustors may demand at any time (up to and including December 31 of the year in which a transfer to his or her Trust has been made) the sum of Four Thousand Dollars (\$4,000.00) or the amount of the transfer from each donor, whichever is less, payable in cash immediately upon receipt by the Trustee of the demand in writing and in any event, not later than December 31 in the year in which such transfers was made. Such payment shall be made from the gift of that donor for that year. If a child is a minor at the time of such gift of that donor for that year, or fails in legal capacity for any reason, the child's guardian may make such demand on behalf of the child. The property received pursuant to the demand shall be held by the guardian for the benefit and use of the child.

Paragraph "FOUR" authorized the trustee, in his discretion, to distribute the trust income to each beneficiary until he attained the age of 21. The trustee was required to distribute trust income to each beneficiary, from age 21 to 35. When a beneficiary reached 35, the trustee was authorized, in his discretion, to distribute trust income to each beneficiary or his issue. (R. 67-68.) In addition, the trustee was authorized to invade the trust corpus of a beneficiary "up to the whole thereof" if the trustee, in his discretion, felt that the need of a beneficiary for his "proper care

maintenance, support and education" so required. Upon the death of a beneficiary, his share of the corpus was to go to his surviving issue; if he died without issue, then it was to be added equally to the trusts of the surviving children of the grantors. When each surviving issue of an original beneficiary reached the age of 25, the trustee was to distribute one-third of the principal in his trust to him; when he reached the age of 30, one-half of the remaining principal; and when he reached the age of 35, the remaining principal. (R. 68.)

Paragraph "FIVE" required the trustee, in exercising his discretionary authority under the trust, to consider any income a beneficiary received from sources outside the trust, including the legal duty and obligation of the grantors to support their children. Paragraph "EIGHT" named Robert F. Foster, trustee. Paragraph "NINE" incorporated a spendthrift provision into the trust prohibiting the trust beneficiaries from financially encumbering either the principal or income under their respective trusts. (R. 68.)

After an initial contribution of \$50, each taxpayer made the following additional transfers of property to the trust (R. 69):

<u>Date</u>	<u>Amount</u>
June 20, 1962	\$ 4,267.77
December 15, 1962	49,550.00
December 19, 1963	12,797.81
Total	<u>\$66,615.58</u>

During the years 1962 and 1963, the minor children of taxpayers lived with their parents who fully provided for their needs. During those years no beneficiary demanded any part of his trust property

nor were distributions made to any of the beneficiaries by the trustee. In addition, no legal guardian was appointed for any of taxpayers' minor children, either by the trust instrument or by a court of competent jurisdiction. (R. 69.)

In filing their federal gift tax returns for 1962 and 1963, taxpayers each claimed a \$3,000 gift tax exclusion for each of the four trust beneficiaries, constituting a total claimed exclusion by each taxpayer of \$24,000 for the two years in question. The Commissioner of Internal Revenue determined that each taxpayer was entitled to only one \$3,000 exclusion for 1962 and one \$3,000 exclusion for 1963 on the ground that the portion of the gifts in trust for the minor beneficiaries (those under 21) were "future interests" and therefore disallowed by the terms of Section 2503(b) of the 1954 Code. (R. 69-70.) In the proceedings below by way of stipulation, the Commissioner conceded that each taxpayer is entitled to an additional \$3,000 exclusion for 1963 on account of the fact that Janet Sheldon Crumney reached adult status (21 years of age) before the close of that year. (R. 30, 70.)

Taxpayers petitioned the Tax Court of the United States. (R. 1-3, 12-14.) On the basis of these evidentiary findings and the record in this case, the Tax Court sustained the deficiencies to the extent of \$2,477.72. (R. 87, 93.) The deficiencies as found by the Tax Court were based upon its holding that under the terms of the trust and the law of California, the gifts for the benefit of the two minor children were future interests and did not qualify for the gift tax exclusion. (R. 70, 81.) However, the Tax Court also held

that, despite the minority (20 years of age) of Janet Sheldon Crumney during 1962, the gifts for her benefit during that year were present interests which did qualify for the gift tax exclusion. (R. 73.)

From that action, taxpayers have prosecuted the instant petition for review (R. 96-100), and the Commissioner has prosecuted the instant cross-petition for review (R. 107-109).

SPECIFICATION OF ERROR RELIED UPON BY THE COMMISSIONER

The Tax Court erred in holding that, in the absence of an appointed guardian, transfers in trust for the benefit of a 20-year old minor were present interests and therefore could qualify for the gift tax exclusion of Section 2503(b), because the trust provided that minor beneficiaries could only demand a fixed amount of corpus through a guardian.

SUMMARY OF ARGUMENT

The Tax Court correctly held that transfers in trust for the benefit of 11 and 15 year old minors were not present interests to any extent, and therefore could not qualify for the gift tax exclusion of Section 2503(b) of the 1954 Code. Taxpayers created a trust for the benefit of their children. It provided that before the end of the year, each beneficiary could demand from the trustee the lesser of \$4,000 or the amount of the annual transfer. However, the trust further provided that if the beneficiary was a minor at the time of the gift, or failed in legal capacity for any reason, the beneficiary's guardian could make such demand for corpus upon the trustee. No guardian was appointed and none could reasonably be

expected to be appointed. Consequently, in the absence of an appointed guardian, the minor beneficiaries (aged 11 and 15) were not capable of making an effective demand upon the trustee. Moreover, even if the appointment of a guardian was not a prerequisite to the making of a demand under the trust instrument, these minor beneficiaries could not have made an effective demand upon the trustee under California law.

The Tax Court erroneously held that the transfers in trust for the benefit of the taxpayers' 20-year old daughter were present interests to the extent of the right to demand partial distribution of corpus. It is the Commissioner's contention that under the terms of the trust instrument and the relevant California law, the 20-year old daughter (a minor) suffered from the same legal incapacity as her 11 and 15-year old brothers. No guardian was appointed for her, and none could reasonably have been expected to be appointed. Moreover, she was not able to make an effective demand upon the trustee because of her minority status. The Tax Court's reliance upon a 20-year old's ability to make certain classes of contracts under California Civil Code, Section 33 was misplaced. Accordingly, the gifts in trust for the 20-year old's benefit were future interests, which do not qualify for the gift tax exclusion of Section 2503(b).

ARGUMENT

I

THE TAX COURT CORRECTLY HELD THAT IN THE ABSENCE OF AN APPOINTED GUARDIAN, TRANSFERS IN TRUST FOR THE BENEFIT OF 11 AND 15 YEAR OLD MINORS WERE NOT PRESENT INTERESTS AND THEREFORE COULD NOT QUALIFY FOR THE GIFT TAX EXCLUSION OF SECTION 2503(b), INTERNAL REVENUE CODE OF 1954, WHERE THE TRUST PROVIDED THAT MINOR BENEFICIARIES COULD ONLY DEMAND A FIXED AMOUNT OF CORPUS THROUGH A GUARDIAN

A. Introduction

Section 2503(b) of the Internal Revenue Code of 1954, Appendix, infra, excludes from taxable gifts the first \$3,000 of each gift made to any person, provided that such gifts are "other than gifts of future interests in property". The term "future interests" is defined in Treasury Regulations on Gift Tax (1954 Code), Section 25.2503-3(a), as follows:

"Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession or enjoyment at some future date or time.

This definition has been expressly approved by the Supreme Court in United States v. Pelzer, 312 U.S. 399; Ryerson v. United States, 312 U.S. 405; Fondren v. Commissioner, 324 U.S. 18; and Commissioner v. Disston, 325 U.S. 442.

Thus, in determining whether a gift is a present or future interest, the time of vesting of legal or equitable title is immaterial. The critical time is when enjoyment begins and the above-cited cases clearly indicate that the economic satisfaction which

the donee may derive from knowing that he will receive valuable property in the future is not the kind of present enjoyment which would make the gift one of a present interest.

The sole issue on taxpayers' petition for review is whether the transfers in trust for the benefit of two of their children (both minors age 11 and 15) were present interests within the meaning of Section 2503(b).^{1/} The Tax Court concluded from an examination of the trust at issue that the transfers for the benefit of the 11 and 15 year old minor beneficiaries were future interests and therefore did not qualify for the gift tax exclusion of Section 2503(b). We contend that this result was correct and should be affirmed.

B. Neither the terms nor the surrounding circumstances of the trust executed by taxpayers conferred to any extent present interest in property upon the minor beneficiaries

In the instant case, an irrevocable trust was created by the taxpayers, wherein it was provided that each beneficiary could demand the lesser of his annual gift of corpus or \$4,000, if such demand was made before the end of the year in which such transfer was made. In this connection, the trust further stated (R. 67):

If a child is a minor at the time of such gift of that donor for that year, or fails in legal capacity for any reason, the child's guardian may make such demand on behalf of the child.

^{1/} Taxpayers do not contend that the trust herein meets the requirements of Section 2503(c) of the 1954 Code. It is clear that the terms of the trust do not bring it within the purview of that section, as the Tax Court so held. (R. 72.)

Taxpayers entirely rely upon the alleged right of the beneficiaries to demand a portion of the annual transfers to the trust as conferring a present interest in the beneficiaries to the extent of this right. It is our contention that because the beneficiaries, aged 11 and 15, were minors under California law, they did not possess the legal capacity to make this demand. Moreover, under the above-quoted terms of the trust, they could only make such a demand through a guardian. In this respect, the record is clear that no guardian was appointed during the years at issue nor did any beneficiary demand any part of his trust property. (R. 69.) Hence, the beneficiaries' so-called right to demand partial distribution of the trust corpus was at no time during the years at issue exerciseable by anyone. It was at best an empty right. The very fact that this situation existed is an indication of the conditional nature of the gift. An interest whose enjoyment is dependent upon such future contingencies is, we submit, a future interest. It is not an interest limited to commence in enjoyment at the time the gift is made.

The instant case is in all material respects identical to that of Stifel v. Commissioner, 197 F. 2d 107 (C.A. 2d), affirming 17 T.C. 647. In Stifel, the trust provided that the minor beneficiary had "the right (which may be exercised during her minority by her general guardian, if any, or by any special guardian appointed for such purpose by a court of competent jurisdiction, but in no event by the settlor) at any time to terminate the trust" and thereby cause a distribution of corpus. (17 T.C. 647, 648). The Tax Court and the Second Circuit both held that this "right" did not make the

transfers present interests within the meaning of the gift tax, since none of the minor children could make a demand without a guardian and no guardian was appointed during the years involved. In reaching this result, the Second Circuit indicated that it was strongly influenced by these restrictions, although they did not expressly appear in the trust instrument, for it observed (197 F. 2d 107, 110):

It is urged that neither the Tax Court nor we may properly consider these items, since they involve restrictions not contained in the trust instrument. Cf. Kieckhefer v. Commissioner, 189 F. 2d 118, 122 (C.A. 7). But in Fondren v. Commissioner, 324 U.S. 18, 24 and Commissioner v. Disston, 325 U.S. 442, 449, the Supreme Court, in determining the nature of the rights conferred by the trust instruments, took account of "surrounding circumstances"; the Court, in reaching its determinations, did not lock itself inside the "four corners" of the writings but held that the key might lie outside. Were this not the rule, a donor could make gifts which on paper were 100% present but in practice were 100% future.

It must be further noted that in Commissioner v. Sharp, 153 F. 2d 163, this Court has adopted the same view of the relevant Supreme Court decisions, stating (p. 164) that "all the circumstances under which the gift was made" are to be considered.

Similarly, in the present case, the beneficiaries' right to demand partial distribution of corpus had no practical meaning. As in Stifel, the beneficiaries whose gifts are at issue were minors during the years in question, the terms of the trust provided that none of the minor children could demand partial distribution without a guardian, and no guardian was appointed. Taxpayers' failure to appoint a guardian, coupled with the other provisions of the trust which called for ultimate termination only after the death of

taxpayers' children (R. 67-68), establishes "surrounding circumstances" which clearly negative any inference that the demand clause of Paragraph "THREE" conferred any meaningful rights. Furthermore, the record indicates that the children had no need of the trust principal or income for their support, since they lived with their parents who fully provided for their needs during the years in question. (R. 69.) It is therefore evident that the right to demand any part of the corpus was not intended to be exercised during the years of the beneficiaries' minority, but only in the event of some radical change in existing circumstances, as a reversal in taxpayers' fortunes or the children attaining an age at which they could make some independent personal use of the money. This contingency was on the face of the record nonexistent during the years in issue, and there was no showing by taxpayers that it was likely to occur in the future, or at any rate during the beneficiaries' minority. Fondren v. Commissioner, supra, p. 24. As a practical matter, taxpayers controlled the application for appointment of a guardian. None was in fact appointed and taxpayers knew and intended that none should be applied for.

Taxpayers principally rely upon the decision in Kieckhefer v. Commissioner, 189 F. 2d 118 (C.A. 7th). (Br. 22-24.) We respectfully regard the Kieckhefer case as incorrectly decided by the Seventh Circuit and subscribe to the dissenting view of Judge Kerner (189 F. 2d 118, 122) and the opinion of the Tax Court in that case (15 T.C. 111). In considering only the terms of the trust as relevant and thereby ignoring the surrounding circumstances, the

Court of Appeals in Kieckhefer disregarded the rule as set forth by the Supreme Court in Fondren v. Commissioner, supra.

In any event, the instant trust more plainly than that in Kieckhefer confirms the fact that taxpayers intended that the children were not intended actually to have the immediate use, possession or enjoyment of principal under Paragraph "THREE" due to the short period of time they had to exercise their right of demand.^{2/} Moreover, the ultimate right to the principal was not vested in taxpayers' children but in their issue; while in Kieckhefer, the entire trust estate was to be paid over to the beneficiary when he reached 21 years of age.^{3/} Hence, under the language of Fondren, supra, pp. 20-21, there existed "the barrier of a substantial period between the will of the beneficiary or donee now to enjoy what has been given him and that enjoyment." Finally, the language of the instant trust differs markedly from that in Kieckhefer, in so far as in the present case the demand could only be made by a guardian if the beneficiary was a minor. The trust in Kieckhefer stated that the beneficiary "or the legally appointed guardian for his estate shall make due demand." (189 F. 2d 118, 120.) (Emphasis added.) Consequently, even if the Seventh Circuit's holding was

^{2/} The demand had to be made before the end of the year in which the particular transfer was made. In each of the two years in issue, the transfers were made 16 and 12 days prior to the end of the year (R. 69), and there was no showing that the beneficiaries received notice of the transfers. Clearly, taxpayers by the mechanics of the trust and the manner in which it was implemented, did not intend the right of demand to be exercised.

^{3/} In this respect, it is noteworthy that under the present law, the trust in Kieckhefer would have qualified under Section 2503(c) as a "Transfer for the Benefit of a Minor."

that a minor beneficiary could make an effective demand on corpus, its opinion does not control the disposition of the instant case, where the minor beneficiaries could only make a demand through a guardian. In this respect, the decision of the Tax Court below does not turn only on the disabilities of the beneficiaries under state law but also on the fact that no guardian was in fact appointed. Cf. Stifel v. Commissioner, supra. Clearly, each case must be decided in the light of its own trust instrument and surrounding circumstances. Commissioner v. Kempner, 126 F. 2d 853 (C.A. 5th). We contend that the absence of a guardian herein brings this case closer to the holding in Stifel v. Commissioner, supra.

In addition to the foregoing, it is submitted that contrary to the reasoning of Kleckhefer v. Commissioner, supra, pp. 121-122, a result, such as reached below, does not imply a holding that all gifts to minors are gifts of future interests under Section 2503(b). An outright gift to a minor or to the guardian of a minor or to any trust with the trustee under absolute duty to pay without restriction to or apply for the benefit of a minor has repeatedly been held to constitute a present interest under Section 2503(b) of the 1954 Code or its predecessor provision Section 1003(b) of the 1939 Code. Fisher v. Commissioner, 132 F. 2d 383 (C.A. 9th); Commissioner v. Sharp, supra; Roeser v. Commissioner, 2 T.C. 298, 304-305. Accordingly, the gift here is of a future interest, not merely because the beneficiaries were minors and the law or the trust required the appointment of a guardian in order to exercise the demand for

distribution of corpus. Rather, the other provisions of the trust evidence an intention of the taxpayers not to allow the appointment of a guardian (even if possible under state law) by controlling the time for demand of corpus. Furthermore, the long duration of the trust and its spendthrift provisions, with no contrary evidence in the record, establishes that taxpayers' children were not in fact to enjoy presently any part of the principal.

Taxpayers' reliance upon Gilmore v. Commissioner, 213 F. 2d 520 (C.A. 6th), reversing 20 T.C. 579, is similarly misplaced. (Br. 24-27.) The ground of the Sixth Circuit's reversal of the Tax Court was its belief that the trustee's discretionary power to invest the funds in non-income producing properties and to use the entire trust estate for the benefit of the beneficiaries did not render the transfers future interests. Contrary to the instant case, the trust in Gilmore, although for the benefit of minors, did not specify that demand for distribution could only be made through a guardian. Rather, both the Tax Court and the Sixth Circuit restricted their holdings upon an analysis of the trust provisions, and did not deal specifically with the problem in the instant case--the possible disability of the minor beneficiaries from making an effective demand. Any reliance which the Sixth Circuit may have placed upon Kieckhefer is merely dictum.

Finally, taxpayers also seek to derive comfort from the decision of the Tax Court in Perkins v. Commissioner, 27 T.C. 601. (Br. 27-29.) In that case, the court specifically noted that the right to demand income and principal was given to the adult parents of the

beneficiaries, the trust having been established by a grandfather of the beneficiaries. Consequently, the Tax Court was able to find that "there was at all times someone who could have made an effective, binding demand for principal and income." (27 T.C. 601, 605.) We submit that this effectively distinguishes Perkins from the instant case, where the minor beneficiaries could only make a demand through a guardian, and where no guardian was appointed during the years at issue. We therefore urge that this failure to appoint a guardian coupled with the other provisions of the trust brings the instant case under the rationale of Stifel v. Commissioner, supra. Because the 11 and 15 year old beneficiaries could not, and were not intended to, exercise their right of demand, the interests conferred upon them were future interests.

C. The requirement of the appointment of a guardian vitiated the minor beneficiaries' right to demand under the trust instrument, because such appointment was a remote contingency under California law

Paragraph "THREE" of the trust at issue provided that if the beneficiary was a minor or failed in legal capacity for any reason, "the child's guardian may make such demand on behalf of the child." (R. 67.) Hence, we contend that the need for a guardian was intrinsic to the trust instrument if the beneficiary was a minor. Under such a reading, no inquiry of state law would be necessary because all of the beneficiaries at issue were clearly under 21 years of age and therefore minors under California law. California Civil Code, Section 25, Appendix, infra. Consequently, the absence of an appointment of a guardian during the years in question is most

relevant, as it rendered the beneficiaries' right to demand completely ineffective. Stifel v. Commissioner, supra, p. 110.^{4/}

However, it is also noteworthy that under California law, the appointment of a guardian in the circumstances of the instant case would have been most unlikely.

The statutory authority for the appointment of guardians for minors is found in California, Probate Code Section 1440, Appendix, infra. The very language of Section 1440 makes it clear that there is no absolute right to an appointment of a guardian under it, because the statutory standard of "necessary or convenient" must be met before a court can appoint a guardian. In re Kentera's Guardianship, 41 Cal. 2d 639, 262 P. 2d 317; In re Harmon's Guardianship, 121 Cal. App. 2d 646, 263 P. 2d 649. Under the facts at bar, where taxpayers supported and housed all of their children during the years at issue (R. 69), there is no evidence to support the contention that the minor beneficiaries required the appointment of a guardian to protect their estates. Whatever interests the minor beneficiaries had in the trusts were well protected by the trust mechanism. Consequently, absent a serious reversal of taxpayers' financial state (a contingency which we contend is too hypothetical

^{4/} We do not imply that the appointment of a guardian is always necessary in order to qualify a gift to a minor donee as a present interest. See Rev. Rul. 54-400, 1942-2 Cum. Bull. 319. However, in the instant case present ownership could only be secured by means of a guardian who was needed to perform certain legal tasks, such as the demand upon the trustee. See Rev. Rul. 54-91, 1954-1 Cum. Bull. 207. When the trustee himself holds the property in the capacity of a guardian, who can act without a demand upon him, there is no obstacle to present enjoyment of the transfers. Cf. United States v. Baker, 236 F. 2d 317 (C.A. 4th); Rev. Rul. 59-78, 1959-1 Cum. bull. 690.

to be properly considered), ^{5/} there is no doubt that the "necessary or convenient" standard of Section 1440 would not be met.

Taxpayers argue (Br. 14-16) that since the minor beneficiaries were over 14 years of age, ^{6/} they had the right to petition a court for the appointment of a guardian and thereby demand partial distribution of corpus from the trustee. We acknowledge that California Probate Code, Section 1440, grants the right of petition for appointment of a guardian to a minor over 14 years of age over the person or the estate. However, as in other guardianship cases, there must be an initial showing of necessity or convenience. In re Kentera's Guardianship, ^{7/} supra, p. 319.

Clearly, none of taxpayers' minor children would have been able to convince a court to establish a guardianship over their person, absent a showing that their parents were not treating them properly. In re Guardianship of Rose, 171 Cal. App. 2d 677, 340 P. 2d 1045. As stated by the Supreme Court of California in Kentera, supra, p.

319: "The statutory provisions were not intended to upset the normal

^{5/} Taxpayers contend otherwise. (Br. 20.) However, the contingency of taxpayers' inability to support their children was plainly so remote on the record as to cause a "certainty of postponement" of enjoyment of the transfers within the meaning of Fondren v. Commissioner, supra, p. 26.

^{6/} In this respect, it should be noted that Mark Clifford Crumney was born on February 20, 1951 (R. 66), and therefore did not attain the age of 14 during the years at issue.

^{7/} This case involved guardianship over the person rather than over the estate. Consequently, the abstract quotation from it cited by taxpayers (Br. 15) is dictum. As we point out infra, the record in the instant case strongly negatives the possibility that taxpayers' minor children would be successful in planning the appointment of a guardian.

relationship of parent or child or to disrupt normal family discipline by allowing the fourteen-year-old minor to withdraw from the family circle at his whim." Furthermore, in order to secure a guardian over their estates, the minor children here would have had to show that their parents were incapable of supporting them or that the trust agreement was in some way depriving them of necessary funds. Such a petition is addressed to the discretion of the court. Cf.

In re Estate of Meiklejohn, 171 Cal. 247, 152 Pac. 734. It is highly doubtful, if not well nigh impossible, that a court would upset the clear intention of the taxpayers to create a trust of long duration. ^{8/}

Surely, the best interests and welfare of the Crumney children would not have required the appointment of a guardian upon their petition. ^{9/}

In re Reynolds' Guardianship, 60 Cal. App. 2d 669, 141 P. 2d 498;

In re Howard's Guardianship, 218 Cal. 607, 24 P. 2d 486. Taxpayers' attempt (Br. 16) to derive from the right of 14-year-old minors to appoint their own guardian the sufficient "degree of maturity" required to demand partial distribution of corpus upon the trustee is completely without foundation. The grant of a specific statutory

^{8/} The right of taxpayers to dispose of property in the trust at issue should not under normal circumstances be infringed by the statutory right of a minor child to appoint his own guardian. Compare California Probate Code, Section 1406.5, Appendix, *infra*, with Section 1402. While taxpayers did not appoint a guardian under the trust, their disposition of the property to a trustee appears to be a right similar to that given by Section 1402.

^{9/} Taxpayers also appear to argue (Br. 17-22) that they could have secured the appointment of a guardian for their children in their capacity as natural guardians. We do not believe that this would have been likely, absent a turn in their fortunes--a contingency too remote to be properly considered upon the present record. See fn. 6, *supra*. In addition, their failure to do so (even if such right existed) is relevant. Stifel v. Commissioner, *supra*, p. 110.

right under limited circumstances does not confer upon the class a general ability to exercise effectively other types of legal rights.

Finally, taxpayers urge (Br. 17-22) that taxpayers as parents, were the natural guardians of their minor children, and therefore had the right to make demand upon the trustee for partial distribution. What they overlook by this broad assertion is that a guardianship by nature is only of the person, and not of the estate of the child. Kendall v. Miller, 9 Cal. 591. It is well settled in California that a parent as such has no control over his child's property, California Civil Code, Section 202, Appendix, infra. Infancy does not incapacitate a person from owning property. In re Tetsubumi Yano's Estate, 188 Cal. 645, 649, 206 Pac. 995. See also Emery v. Emery, 45 Cal. 2d 421, 289 P. 2d 218. Consequently, taxpayers have admitted that they could not demand partial distribution of corpus from the trustee unless they were appointed legal guardians over the estate of their minor children by a court. (Br. 17-18.)^{10/} We do not dispute the possibility suggested by taxpayers (Br. 20-22) that they, as natural guardians, might be appointed legal guardians by a court and demand portions of the corpus, holding such portions in a fiduciary capacity. However, absent any showing in the record that such a contingency was at all likely during the years in question in view of the requirements of California law, coupled with

^{10/} Contrary to taxpayers' assertions (Br. 19), California Probate Code, Sections 1430 and 1431, do not aid them. These provisions confer the mantle of legal guardianship upon parents over the estate of their minor children only when a small amount of property is involved, much less than in the instant case.

taxpayers' expressed intention to create a trust of long duration makes the possibility of this event too speculative to change what are clearly future interests into present interests.

Finally, taxpayers argue (Br. 31) that the Tax Court erred in denying their motion for a new trial (R. 94-95). This motion was made on the ground that taxpayers wished to introduce additional evidence to the effect that taxpayer D. Clifford Crumney had been appointed guardian of the person and estate of his minor children by a court of competent jurisdiction in 1951. Such a motion is addressed to the sound discretion of the court and taxpayers must show that the new evidence was not available to them at the time of the hearing. Bankers Coal Co. v. Burnet, 287 U.S. 308; Standard Knitting Mills v. Commissioner, 141 F. 2d 195 (C.A. 6th), certiorari denied, 322 U.S. 753; Sisto Financial Corp. v. Commissioner, 149 F. 2d 268 (C.A. 2d). The new evidence which taxpayers wish to submit involves proof of an event which allegedly occurred 14 years before trial. Clearly it was available to them at the time of the hearing. As the court stated in Goodman v. Commissioner, 200 F. 2d 681, 683 (C.A. 2d), "a failure to condone inexcusable neglect is not an abuse of discretion." In the light of the above, the Tax Court correctly denied taxpayers' motion for a new trial.

- D. Even if the minor beneficiaries could demand partial distribution of the trust corpus without the assistance of a guardian, such demand would not have been effective under California law

Although we have argued that under the trust the Crumney children, as minors, could not have made a demand for corpus without the appointment of a guardian, the Tax Court interpreted the terms of Paragraph "THREE" to mean that "if a minor beneficiary is not prohibited by state law from making his own demand, he had the right under the trust instrument to do so without the assistance of a guardian." (R. 73.) It thus adopted the position that the need for a guardian was intrinsic to the ability of the minor beneficiaries to make an effective demand under state law. However, it is our contention that even under such an interpretation of the trust, an examination of the relevant California law indicates that the Tax Court's holding was correct with respect to the minor beneficiaries, ages 11 and 15. Neither child could have made an effective demand under California law.

As we have already pointed out, supra, California Civil Code, Section 25, provides that minors are all persons under 21 years of age.^{11/} Accordingly, minors are not capable of delegating power by appointing agents and are not capable of instituting suits in their own names, but only by a guardian; any contracts which they might enter into would be voidable and could be repudiated when they

^{11/} The only exception to this general rule is that married women over 18 are granted majority status. California Civil Code, Section 25.

reached their majority. California Civil Code, Sections 33, 35, 42 and 1556, Appendix, ^{12/}infra. Given the broad disability of David and Mark Crumney under California law, it can well be said that minors are presumed to be incapable of exercising a sound discretion over their affairs. Hence, the law presumes their acceptance of gifts which would be beneficial, although they have no direct knowledge of such gifts. De Levillain v. Evans, 39 Cal. 120. Hence, it is difficult to imagine that either minor beneficiary (aged 11 or 15) could have made an effective demand under Paragraph "THIRD" of the trust. In order for such a demand to be "effective", it would have had to be enforceable by the minor beneficiary. Plainly, their inability to sue in their own name without a guardian or to delegate authority strongly demonstrates that their right to demand was practically speaking merely a paper right, which if exercised, could not have been enforced. California Civil Code, Sections 33, 42; Keane v. Penha, 76 Cal. App. 2d 693, 173 P. 2d 835. Consequently, we maintain that the Tax Court's holding that neither David nor Mark Crumney could have made an effective demand of the trustee under California law was correct.

Taxpayers contend that the above stated disabilities are irrelevant and cite many cases for the proposition that minors are capable of owning property. ^{13/}(Br. 8-13.) We agree that minors have the right to own property and receive gifts, but that is not the issue

^{12/} Certain exceptions are made for the purchase of necessities, contracts for dramatic or athletic services, and obligations made pursuant to statute. See California Civil Code, Sections 36 and 37, Appendix, infra.

^{13/} See e.g. Oyama v. California, 332 U.S. 633.

at bar. ^{14/} The question presented here is whether the 11 or 15-year old minors could effectively make a demand upon the trustee to effect partial distribution of the trust's corpus. In answering this question, the Tax Court correctly referred to the general disabilities of minors under California law.

Finally, we also submit that taxpayers' attempt (Br. 12-13) to draw support from several sections of the California Financial Code and Corporations Code avails them nothing. These provisions generally discharge banks and corporations who make payments to minors, either through withdrawal or dividends, respectively. In so providing, the California legislature recognized that a bank or a corporation should not be charged with notice that one of its account holders or stockholders is a minor. These statutes have thereby facilitated the relationship between minors and large financial institutions. If this were not the case, an impossible burden would be placed upon such institutions. However, the situation governed by these code provisions is entirely unlike the instant case. Firstly, the relationship between the minors and the trustee is not of the impersonal character as that between a minor and a bank. Secondly, a minor who has a bank account or a share of stock ^{15/} owns this property outright, and does not have to take

14/ In addition, contrary to taxpayers' assertions (Br. 9-10), the rights of minors to due process in juvenile court proceeding have no relevance to the issues presented here.

15/ It should be noted that gifts of stock to minors under 21 years old require a custodian pursuant to the Gifts of Securities to Minors Act, California Civil Code, Section 1154.

any legal steps to secure ownership. Plainly, withdrawal of funds from a bank does not secure ownership, for ownership is already present in the account holder. However, in the present case the minor beneficiaries could only secure ownership by an effective demand--a legal step they were incapable of taking under California law. This incapacity is plainly recognized by the trust instrument itself, which uses the phrase "If a child is a minor *** or fails in legal capacity for any reason." (R. 67.) (Emphasis added.) Surely minority was regarded by the parties as one example of failure of legal capacity. In view of the above, we submit that the Tax Court's holding that the transfers to David and Mark Crumney were future interests was correct and should be affirmed.

II

THE TAX COURT ERRED IN HOLDING THAT UNDER THE SAME TERMS AND CIRCUMSTANCES OF THE ABOVE-MENTIONED TRUST, TRANSFERS FOR THE BENEFIT OF A 20-YEAR OLD MINOR DID QUALIFY FOR THE GIFT TAX EXCLUSION OF SECTION 2503(b) OF THE 1954 CODE

Taxpayers' daughter, Janet Sheldon Crumney, was also a beneficiary of the trust in question. She was born on June 21, 1942 (R. 66), and was therefore 20 years old during the taxable year 1962. The Commissioner conceded below that taxpayers were each entitled to the gift tax exclusion for the transfers in trust for the benefit of their daughter for the year 1963 on account of the fact that she attained adult status before the end of that year. (R. 30, 70.) However, the Tax Court held that despite her minority (age 20) during 1962, the transfers in trust for her benefit were present interests and thereby qualified for the gift tax exclusion

of Section 2503(b) of the 1954 Code. It is this aspect of the Tax Court's holding that is the subject of the Commissioner's cross-petition for review.

The Tax Court's conclusion with respect to the gift to Janet Crummey rested entirely upon California Civil Code, Section 33. This provision allows a minor who has attained the age of 18 to "make a contract relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control." From this provision and the fact that a minor may also hold title to property, the Tax Court stated (R. 73):

Possessed of such broad rights under state law, and suffering from no legal disabilities brought to our attention, we hold that in 1962, when Janet Sheldon Crummey was 20, she could have effectively demanded \$4,000 from any and each total gift over that amount ***, that amount thereby constituting a present interest.

We believe that this aspect of the decision below represents an erroneous interpretation of California law and should be reversed.

It is our contention that the fact that a 20-year old can own property and make certain contracts does not answer the question at bar--whether a 20-year old could have effectively made a demand upon the trust in question. ^{16/} Firstly, as we have pointed out supra, we do not dispute the proposition that a minor can own property in

16/ For purposes of this argument, we will assume that the Tax Court's interpretation of the trust instrument was correct and that the appointment of a guardian was not a prerequisite for a minor beneficiary to make a demand. However, we continue to urge that the proper interpretation is as we have stated in Point I.B, supra. Under that argument, we urged that Janet Crummey's minority status coupled with lack of a guardian would have precluded an effective demand upon the trustee.

California, but we do not believe that this is relevant to the instant inquiry.^{17/} Secondly, although a converse reading of Civil Code, Section 33, indicates that Janet Crumney could contract with respect to real property or to personal property not within her control, this does not imply, as the Tax Court stated, that she was "[P]ossessed of *** broad rights under state law." (R. 73.) However, the statutory scheme makes it eminently clear that except for the contracts under Civil Code, Sections 36 and 37, Appendix, infra, all contracts executed by a minor are voidable, unless they are specifically stated to be void by Civil Code, Section 33.^{18/} Consequently, had Janet Crumney made such contracts, they would have been voidable, and subject to her privilege to disaffirm. California Civil Code, Sections 35-37.

Furthermore, we urge that all we have pointed out with respect to the disabilities of her two brothers in Point I, supra, applies to Janet Crumney as well. She was clearly a minor under the terms of Civil Code, Section 25, since she had reached the age of 21 during 1962, the year in question. Any demand she might have made upon the trustee could not have been enforced as a practical matter, since she lacked the capacity to sue in her own name without a guardian (Civil Code, Section 42), and any attempt by her to petition for

^{17/} It appears that a minor's right to own property is not at all conclusive, in view of the fact that the Tax Court's observation on this point would go to the two children who were below 18 as well.

^{18/} Indeed, any delegation of authority is void with respect to all minors. California Civil Code, Section 33. Hence, none of the minor beneficiaries herein could have appointed an attorney to press their demands against the trustee. They could only proceed after the appointment of a guardian ad litem. Johnston v. Southern Pac. Co., 150 Cal. 535, 89 Pac. 348; In re Price, 61 Cal. App. 592, 215 Pac. 710

the appointment of a guardian would not, under the circumstances evidenced in the record, have met the "necessary or convenient" standard of Probate Code, Section 1410. As we have earlier stated, the possibility of changed circumstances which might have convinced a court to provide the necessary legal mechanics to distribute part of the corpus during the years in question is entirely too speculative to merit characterization of any of the instant transfers in trust as present interests.

In sum, we contend that Janet Crumney's capacity to enter into a certain class of contracts, otherwise void but which were voidable as to her because she was over 18, is not a pivotal distinction which compels the conclusion that she could have effectively demanded a partial distribution from the trustee. Her capacity in this regard is totally unrelated to her right to unilaterally demand partial distribution of corpus from the trustee under the terms of the trust, since such a demand is not even remotely connected with the liabilities and duties which arise under a contract between two parties as contemplated by Civil Code, Section 33. Consequently, it is submitted that she was in no better position vis-a-vis the trustee than her two brothers. None of them could make an effective demand upon the trustee. Accordingly, we urge that the Tax Court's holding that the transfers in trust to Janet Sheldon Crumney were present interests to the extent of \$4,000 is incorrect. Taxpayers are not entitled to a gift tax exclusion for the transfers made in her behalf for the year 1962.

CONCLUSION

For the reasons stated, the decisions of the Tax Court with respect to the claimed gift tax exclusions for the 11 and 15-year old minor beneficiaries are correct and should be affirmed. The decisions of the Tax Court with respect to the claimed gift tax exclusions for the 20-year old minor beneficiary are incorrect and should be reversed. This Court should hold that the transfers in trust to all of the minor beneficiaries were future interests, and as such, do not qualify for the gift tax exclusion.

Respectfully submitted,

RICHARD C. PUGH,
Acting Assistant Attorney General.

MEYER ROTHWACKS,
DAVID O. WALTER,
STUART A. SMITH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

JULY, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of July, 1967.

Attorney

APPENDIX

Internal Revenue Code of 1954:

SEC. 2503. TAXABLE GIFTS.

* * * *

(b) Exclusions From Gifts.--In the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1955 and subsequent calendar years, the first \$3,000 of such gifts to such person shall not, for purposes of subsection (a), be included in the total amount of gifts made during such year. Where there has been a transfer to any person of a present interest in property, the possibility that such interest may be diminished by the exercise of a power shall be disregarded in applying this subsection, if no part of such interest will at any time pass to any other person.

* * * *

(26 U.S.C. 1964 ed., Sec. 2503.)

Civil Code, 6 West's Annotated California Codes:

Sec. 25. Minors defined; exception of married females over 18; effect of annulment

Minors are all persons under 21 years of age; provided that this section shall be subject to the provisions of the titles of this code on marriage and shall not be construed as repealing or limiting the provisions of Section 204 of this code; provided further, that any female who has reached the age of 18 years and thereafter contracts a lawful marriage, or who has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or her estate, or for the purpose of entering into any contract, or for the purpose of maintaining or defending an action affecting her marital status, the same as if she was 21 years of age.

Sec. 33. Minors; delegation of powers; incapacities while under age of 18

A minor cannot give a delegation of power, nor, under the age of eighteen, make a contract relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control.

Sec. 35. Minors; disaffirmance of contracts; restoration of consideration

In all cases other than those specified in sections thirty-six and thirty-seven, the contract of a minor, if made whilst he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards; or, in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent.

Sec. 36. Minors; contracts not disaffirmable

A contract, otherwise valid, entered into during minority, cannot be disaffirmed upon that ground either during the actual minority of the person entering into such contract, or at any time thereafter, in the following cases:

1. Necessaries. A contract to pay the reasonable value of things necessary for his support, or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them; provided, that these things have been actually furnished to him or to his family.

2. Particular services; judicial approval. A contract or agreement employing such person as, or wherein such person agrees to perform or render services as, an actor, actress, or other dramatic performer, or as a participant or player in professional sports, including, but without being limited to, professional boxers, professional wrestlers and professional jockeys, where such contract or agreement has been approved by the superior court in the county in which such minor resides or is employed. Such approval may be given upon the petition of either party to the contract or agreement after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard; and said court shall have jurisdiction to approve, and its approval when

given shall extend to the whole of said contract or agreement, and all of the terms and provisions thereof, including, but without being limited to, any optional or conditional provisions contained therein for extension, prolongation or termination of the term thereof.

Sec. 37. Minors; obligations not disaffirmable

Nor Certain Obligations. A minor cannot disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute.

Sec. 42. Minors may enforce their rights; guardian

Minors May Enforce Their Rights. A minor may enforce his rights by civil action, or other legal proceedings, in the same manner as a person of full age, except that a guardian must conduct the same.

Civil Code, 7 West's Annotated California Codes:

Sec. 202. Property of child; control

Parent Cannot Control The Property Of Child. The parent, as such, has no control over the property of the child.

Civil Code, 8 West's Annotated California Codes:

Sec. 1556. Persons capable of contracting

Who May Contract. All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights.

Probate Code, 54 West's Annotated California Codes:

Sec. 1402. Guardian of estate; appointment by will or deed

A parent may appoint a guardian by will or by deed for the property of any child of such parent, living or likely to be born, which such child may take from such parent by will or succession.

Sec. 1405. General guardian of minors or incompetents; appointment by court; multiple guardians; confirmation of appointments by will or deed

The superior court shall appoint a general guardian of the person and estate, or person or estate, of minors and insane or incompetent persons, whenever necessary or convenient, and when no guardian has been appointed for the purpose by will or by deed. The court, in its discretion, may appoint more than one guardian, each of whom must give a separate bond, and be governed and liable in all respects as a sole guardian. The court shall also confirm an appointment made by will or by deed, whenever requested, upon the same procedure and notice as in the case of appointment by the court.

Sec. 1406. Guardian of minor; rules for appointment

In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare; and if the child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question. If the child resides in this state and is over fourteen years of age, he may nominate his own guardian, either of his own accord or within ten days after being duly cited by the court; and such nominee must be appointed if approved by the court. When a guardian has been appointed for a minor under fourteen years of age, the minor, at any time after he attains that age, may nominate his own guardian, subject to the approval of the court.

Sec. 1406.5. Nomination by minor; restriction

The right of a minor to nominate a guardian is subject to the provisions of Section 1402 of this code.

Sec. 1440. Authority to appoint; petition; guardianship over more than one minor; bond

When it appears necessary or convenient, the superior court of the county in which a minor resides or is temporarily domiciled, or in which a nonresident minor has estate, may appoint a guardian for his person and estate, or person or estate. The appointment may be made upon the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age.

The court may issue letters of guardianship over the person or estate, or both, of more than one minor upon the same application, in its discretion. When there is an application for more than one minor, the court may permit a joint or separate bond in such multiple application.

Nos. 21,607 and 21,607-A

United States Court of Appeals
For the Ninth Circuit

FEB 2 1969

D. CLIFFORD CRUMMEY and ETHEL ELIZABETH CRUMMEY, <i>Petitioners,</i>	}
vs.	
COMMISSIONER OF INTERNAL REVENUE, <i>Respondent.</i>	

On Petition to Review Decisions of the
Tax Court of the United States

REPLY BRIEF FOR PETITIONERS

SEAMAN, COUPER AND WOHL,
2318 K Street,
Sacramento, California 95816,
Attorneys for Petitioners.

ALVIN R. WOHL,
JOHN B. CINNAMON,
2318 K Street,
Sacramento, California 95816,
Of Counsel.

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PRELIMINARY STATEMENT

Petitioner filed his brief in his petition for review on June 23, 1967, and the brief for Respondent was received by Petitioner's attorney on July 25, 1967. This Reply Brief is therefore due to be filed on or before August 24, 1967.

ARGUMENT

In his brief, the Commissioner reasons that the gifts in trust for the minor beneficiaries fail to qual-

ify for the annual exclusion essentially for two reasons.

First, local law precludes a minor from demanding distribution from the Trustee because of his non-age.

We submit that the statutory provisions cited in the opinion of the Court below, in the taxpayers' brief and again the Commissioner's Brief were enacted to protect minors from unfortunate commercial transactions entered into because of their inexperience. We submit further than an objective analysis of the California law discloses that a minor has no lack of capacity to accept a gift and that such capacity is not terminated merely because the minor must ask or demand to receive such gift.

And Second, that even if California law permitted such demand, the Trustors here intended that the right to demand not be exercised.

These are, in general, the same arguments urged by the Commissioner in each of the cases raising the issue of the tax effect of a trust which provides for the minor's right to demand distributions. The *demand* clause in the Crummey trust did not specify nor in any manner evidence the trustor's intent to be that the beneficiaries must make their demand *subsequent* to a transfer in any year. Certainly, a valid, effective demand could be made upon the trustee on January 1 requiring distribution from transfers made later in the year. This is recognized by the Commissioner who allowed without question, the present interest nature and related exclusions relating to

transfers for the beneficiaries over age twenty-one. His disallowance of the exclusion of identical transfers for the minor beneficiaries only serves to dramatize his inconsistency and the inequities inherent in his administration of this gift tax provision, reversed in the many cases cited below

There is another inconsistency also; as noted in the reproduction of the *demand* clause (Br. 4), the trust provided “. . . the child’s guardian *may* make such demand. . . .” After faithfully reproducing the clause the effect of which is before the Court in this case, the Commissioner repeatedly insists that the trust provides that such a demand *could only be made through a guardian*. This patent misconstruction is repeated on almost every page of the Commissioner’s brief. The use of “may” has always been permissive, was accurately construed in this manner by the Court below, and this misleading construction given thereto by the Commissioner serves only to becloud the issue before the Court.

The leading case in this area is *Trust No. 3 v. Commissioner*, 285 F.2d 102. The *demand* clause before the Seventh Circuit in this 1960 case, and the Court’s well reasoned analysis favoring the taxpayer follow. The *demand* clause:

The beneficiaries shall be entitled to all or any part of their share of the trust or to terminate the trust estate in whole or in part at anytime whenever the said Sylvia Brehm, Karen Brehm and Jane Elizabeth Brehm or the legally appointed guardian for one of their estates shall

make due demand thereof by instrument in writing, filed with the then Trustee and, upon such demand being received by the Trustee, the Trustee shall pay said trust estate and its accumulations or the part thereof for which demand is made over to said beneficiaries or to the legally appointed guardian for any one of their estates who made such demands on their behalf.

The Court's analysis:

During the period from March 4, 1954, to December 31, 1956, the beneficiaries under the trust indenture were under the age of twenty-one years. Moreover, they had no legally appointed guardian during that period.

* * * *

In his brief in this court the Commissioner brings our problem into focus by stating:

"The germane inquiry here is whether there could have been an actual termination of the trust or the taking of any part of the trust corpus or income on behalf of these beneficiaries during either of the taxable years before this Court."

He proceeds to answer his own inquiry by asserting that under the trust indenture only the beneficiaries or their legally appointed guardians could terminate the trust estate and that, inasmuch as the beneficiaries were minors during the years in question, they could not themselves terminate the trust, and, there being no guardian appointed during those years, there was then "no one who was immediately qualified to make

the prescribed demand set forth in Paragraph V."

* * * *

We believe that, for several reasons, the Commissioner's argument lacks substance. It is not denied by him that the beneficiaries were given a right to terminate the trust and to take possession of the trust property, but he considers that their minority bars them because (he says) they could not assert that right except through a guardian duly appointed. This distinction is unconvincing in view of the fact that the appointment of a guardian for a minor under a state law is a matter of routine in which the federal government has no concern. To effectuate a termination of the trust as to any child and a delivery of its share of the accumulated income or corpus to the child, customarily there would be delivered to the Trustees a properly authenticated copy of letters of guardianship and a receipt for the assets and monies delivered. However, we think the necessity of such routine steps would have no bearing upon the fundamental question of the legal right of the beneficiaries to terminate the trust. *We should not deny an undisputed right because the conventional methods of exercising it have not been described in the instrument creating the right.* (Emphasis added.)

An even later decision, *Griffith v. United States*, U.S. District Court, S. Dist. Texas, Houston Div., Civil Action No. 13,414, 12/13/62; 63-1 USTC Para. 12, 124; 11 AFTR 2d 1785 cites numerous cases in this field which reject the Commissioner's overly technical viewpoint:

The *demand* clause (in part):

“The trust herein created and all gifts to the trustees hereunder shall be irrevocable so far as the trustees and trustors are concerned, but said trust may be terminated at any time upon demand of the beneficiary, if legally capable of acting for himself, or of any duly appointed and qualified guardian of his estate having the power to manage and control the same.”

* * * *

The Court's analysis:

Under Section 2503(b) the exclusion may not apply where the gift is a future interest in property. The guiding principles on the subject were set forth in the leading case of *Fondren v. Commissioner of Internal Revenue*, 324 U.S. 18, decided January 29, 1945. Accord: *Commissioner of Internal Revenue v. Disston*, 325 U.S. 442, decided June 4, 1945.

* * * *

The taxpayer claiming the exclusion must assume the burden of showing that the value of what he claims is other than a future interest. Cf. *New Colonial Co. v. Helvering*, 292 U.S. 435. *Commissioner of Internal Revenue v. Disston*, supra, at page 449. That burden has been fully satisfied in this case.

It is evident the subject trust instruments were intended to satisfy the test for present interest established in the *Fondren* case. I find that the trust instruments purported to, and did in fact, create a right to a present interest in property in the minor beneficiaries. The gifts made

to and under the trusts were of a present interest. *It is abundantly clear that the statutory exclusion was not intended to discriminate against minors. Fondren v. Commissioner of Internal Revenue*, supra at pages 28, 29; Title 26, U.S.C.A. Section 2503(c). The possible need of legal guardianship does not itself defeat the present interest nature of the donation. *Kieckhefer v. Commissioner of Internal Revenue*, 7 Cir., 189 F.2d 118; *Gilmore v. Commissioner of Internal Revenue*, 6 Cir., 213 F.2d 520; *Trust No. 3 v. Commissioner of Internal Revenue*, 7 Cir., 285 F.2d 102; *United States v. Baker*, 4 Cir., 236 F.2d 317; *Commissioner of Internal Revenue v. Sharp*, 9 Cir., 153 F.2d 163. Contra: *Steifel v. Commissioner of Internal Revenue*, 2 Cir., 197 F.2d 107, decided May 15, 1952. (Emphasis added.)

The *Trust No. 3* and *Griffith* decisions articulate well the present state of the law in this area. Another recent case, *Ross v. United States*, 348 F.2d 577, decided with reference to section 2503(c), nevertheless provides a succinct review of the problem area:

That state laws pertaining to guardianships might pose barriers to the immediate enjoyment of a gift in trust will not cause the gift to be denied present interest status. *Baker v. U.S.*, 4 Cir. 1956 236 F.2d 317 (50 AFTR 1). See also *Strekalovsky v. Delaney*, D. Mass. 1948, 78 F. Supp. 556 (37 AFTR 96); *Cannon v. Robertson*, W.D.N.C. 1951, 98 F.Supp. 331 (40 AFTR 1079); 5 Mertens Law of Federal Gift and Estate Taxation Section 38.12 at 499; Lowndes & Kramer Federal State and Gift Taxes Sec. 33.12 at 728; 2 Casner, Estate Planning 255. The district court

in Arizona has held that a gift to minors in trust qualified for the annual exclusion even though "resort to a court of equity might be necessary" in order for the trustee to invade the trust principal. *DeConcini v. Wood*, D.C. Ariz. 1960, 1 U.S.T.C. par. 11,938, 5 AFTR 2d 1874.

* * * *

The future interest exception, adopted in 1932, was a legislative response to the specific administrative difficulty, in some cases, "of determining the number of eventual donees and the values of their respective gifts." H. Rep. No. 708, 72d Cong., 1st Sess. 29 (1932); S. Rep. No. 665, 72d Cong., 1st Sess. 41 (1932). The courts perhaps because the language of the statute was so broad, extended the future interest concept beyond the limits to which Congress, later, was willing to go. . . .

From this it can be seen that the position tendered by the Commissioner is a highly technical one supported in one Appellate decision, *Steifel v. Commissioner*, 197 F.2d 102 (Br. 11, 15, 17, 18, 20) but discredited as unrealistic, and unfair to minor donees in one case after another since the 1945 *Steifel* decision. The landmark Supreme Court decision, *Fondren* also cited often in the Commissioner's brief is actually neutral as authority in these cases. It announces the "tax" definition of a future interest, which differs somewhat from the "common law, real property" definition, but leaves to the Courts the application of its definition to specific cases. *Fondren*, although cited and followed in *Steifel*, has been cited and followed

in most of the cases which adopt the more realistic position of permitting the annual exclusion.

In an early case, this Court rejected the restrictive interpretation sought by the Commissioner and permitted the gift tax exclusion for transfers into trust where the trust instrument gave the trustee discretionary authority to pay income to the mother or the guardian of the minor beneficiaries, *Commissioner v. Sharp* (C.A. 9 1946, 153 F.2d 163). Similarly, in *U.S. v. Baker*, 236 F.2d 317, where the taxpayers made trust transfers for their minor grandchildren giving the trustee broad powers similar to those of a guardian, the Court held that the minor grandchildren acquired present interests qualifying for gift tax exclusions. Also, in *Albright v. United States*, 308 F.2d 739, where the Fifth Circuit, though not analyzing a *demand* clause, refused to apply a statutory provision designed to resolve an "administrative difficulty" in such a manner to treat a trust transfer for minor beneficiaries as a future interest. In that case the Court resolved a drafting ambiguity so as to support the gift tax exclusion. Similarly in *Strekalovsky v. Delaney*, 78 F.Supp. 556, where the trust "provided that upon the demand of any legally appointed guardian of any of the children, the entire share was to be paid to said guardian", the Court citing this Court's decision in *Sharp*, found a sufficient present interest in the minor beneficiary to support the gift tax exclusion even though no guardian had, in fact, been appointed. Also, following *Sharp*, *Strekalovsky* and *Kieckhefer*, was the Court in *Cannon v.*

Robertson, 98 F.Supp. 331, which allowed the gift tax exclusion, reasoning:

Commissioner of Internal Revenue v. Sharp . . . is a very interesting case and throws a considerable amount of light on the thinking of the court in matters involving a like controversy. Judge Garrecht's reasoning is all embracing and his decision fortifies the law in matters of this kind.

* * * *

The most recent case is that of *Kieckhefer* . . . and on facts almost wholly similar to the facts embraced herein, and in which it was decided that the gift was one of a present rather than a future interest.

SUMMARY OF ARGUMENT

The taxpayer agrees with the Commissioner that the trust transfer is not unlike the transfer in *Steifel*; we submit that the transfers in *Trust No. 3, Griffith, Kieckhefer, Gilmore, Perkins*, and other cases are likewise not dissimilar. We ask this Court to follow its decision and often-cited reasoning in *Sharp*, to once again reject the restrictive and highly technical construction urged by the Commissioner, to avoid discriminating against trust transfers for the benefit of minor beneficiaries, and to recognize the existence of the present interest and qualification for the gift tax exclusion.

Dated, Sacramento, California,
August 18, 1967.

Respectfully submitted,
SEAMAN, COUPER AND WOHL,
Attorneys for Petitioners.

ALVIN R. WOHL,
JOHN B. CINNAMON,
Of Counsel.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN B. CINNAMON,
Attorney for Petitioners.

No. 21767

IN THE

MAY 12 1969

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Petition of WATERMAN STEAMSHIP CORPORATION, a corporation, owner of the vessel SS CHICKASAW, for exoneration from or limitation of liability,

GAY COTTONS, INC., *et al.*,

Cargo Claimants,

SHALOM BABY WEAR,

Cargo Claimant,

UNITED STATES OF AMERICA,

Cargo Claimant.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

PETITION FOR REHEARING.

GRAHAM & JAMES,
LEO J. VANDER LANS,
DON A. PROUDFOOT, JR.,

100 Long Beach Boulevard,
Long Beach, Calif. 90802,

*Attorneys for Appellant Waterman
Steamship Corporation.*

FILED

MAY 8 1969

WILLIAM B. LUCK, CLERK

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PETITION FOR REHEARING.

I. Introduction.

In its opinion of April 24, 1969, this Court, while holding that the judgment of the District Court denying appellant limitation of liability under 46 U.S.C. § 183 could not be sustained on the basis articulated by that Court, nonetheless affirmed based on an application of The Pennsylvania Rule (86 U.S. 125, 1873) to "defects" in the radio direction finder (hereinafter RDF).

Appellant believes this analysis to have been based on a misunderstanding of both the facts and the law as applied to the RDF, a misunderstanding undoubtedly arising from the scant treatment of this issue in the briefs of all parties, and therefore directs its argument solely to that point.¹

II. The Statute and Regulations.

47 U.S.C. § 351 (a) (2) and § 354 (h) (now (i)) required the CHICKASAW to have an RDF which is "efficient and capable of receiving clearly perceptible radio signals and of taking bearings from which the true bearing and direction may be determined." The regulations as they stood at the time of the stranding (see Appendix) are found at 47 C.F.R. § 8.517 (a) and (b). Section 8.517 (a) requires that, "to be approved by the Commission", the RDF must meet five technical specifications including, "(4) be accurately calibrated for the purpose of taking bearings from

¹Appellant is not unaware of the Court's concluding footnote, Opinion p. 19, fn 31, which implies that limitation could be denied on several other grounds. Appellant does not, however, take this to be a ground for decision and simply advises that if it convinces the Court with respect to the need for a rehearing on the RDF issue, it is prepared, at the Court's request, to brief its position with respect to these issues.

which the true bearing and direction may be determined for actual use in radio location service and maritime radio navigation service.”² Section 8.517 (b) requires that “. . . the *calibration* particulars shall be checked at yearly intervals or as near thereto as possible. A record of the *calibration* of any checks made of their accuracy shall be maintained on board the vessel for a period of not less than one year from the date of the related action.” (emphasis added)

An understanding of these regulations requires an explanation of what an RDF is and how it is used. An RDF is essentially a radio receiver with a rotating antenna. By rotation of the antenna the operator can read from the equipment the bearing of a known RDF transmitting station and draw a line of position (hereinafter LOP) on the navigational chart. A second bearing taken on a different station immediately thereafter gives a second LOP and the intersection is a “fix”, that is the vessel’s position assuming the bearings are accurate.

An RDF is subject to three kinds of error: (1) inherent or ship induced errors [see Tr. pp. 537 and 538]; (2) transient error [Tr. pp. 539, 542, 544, 637]; and (3) errors which cannot be compensated for such as those due to night effect, land effect, and operator error [see *e.g.* Tr. pp. 493, and 877 c and d]. The

²The remaining four specifications were indisputably met. This Court states (at p. 18, fn 30) that the evidence is uncontradicted that the FCC did not itself inspect the RDF but only relied on the word of the owner and crew that the equipment was operative. In large part this is factually erroneous. Both the FCC and RCA clearly inspected the equipment for mechanical and electronic function, its ability to locate a particular station, and its sensitivity [Tr. pp. 962-8, 981-2]. The only thing they did not personally do was check the accuracy of the calibration. The reason for this is that the accuracy of the calibration can only be checked at sea [see Tr. p. 1003] thus in the nature of things both the FCC and Appellant had to rely on the crew to make this check.

first of these types of errors rarely changes substantially and is corrected for by *calibrating* the RDF when first installed [Tr. pp. 537-539]. Calibrating the RDF means mechanically adjusting the equipment so it automatically compensates for inherent errors. It is the *calibration* which must be *checked* for accuracy annually to pass the FCC inspection [see Ex. 59] and the calibration is adequate for the FCC inspection if it is within five degrees of the true bearing [Tr. p. 944]. The calibration is checked by the ship's crew by taking both a visual and an RDF bearing, on one RDF station in each of the four quadrants, as the vessel passes them [see Ex. 59].

It is clear from the regulations that what must be done annually is check the RDF's calibration for its continued accuracy. It need not be calibrated annually (as implied by this Court, see Opinion p. 17). It is further clear that what must be maintained on board for one year is not the record of the checks of the calibration; it is the record of any actual calibration (*i.e.* built in adjustment to the equipment) made because the deviation between the visual checks and the RDF bearings as previously calibrated exceeded five degrees in one or more quadrants (see Reg. 8.517 (b), "a record of the *calibration of any checks* made of their (the checks of the original calibration) accuracy shall be maintained on board the vessel for a period of not less than one year from the date of the related action", [and see Tr. pp. 969-971, testimony of FCC Inspector Hall]).

III.

Did the Chickasaw's RDF Violate Either Statute or Regulation?

The evidence is clear that it did not. First, not one word of testimony appears in the record to indicate that at any time was there any mechanical or electronic

defect in the RDF. Second, everyone who used the RDF was satisfied that it was operating properly³ and the inconsistent fixes were attributed to night and land effect.⁴ Third, the only evidence comparing the actual bearings obtained with the true bearings as reconstructed from subsequently known facts, shows them all to have been within normal tolerance and well within the five degree deviation permitted by the FCC for statutory approval [See Tr. pp. 517-518, 642-643].

The position with respect to the two areas in which this Court felt it was "uncontradicted" that the ship did not meet the regulations is the same—there was no violation.

First, were the required annual accuracy checks carried out? The only evidence in the record is that they were. Both the FCC Inspector and the RCA technician engaged by Appellant to prepare the equipment for inspection, testified unequivocally that they observed a record of calibration check bearings taken on a date within ninety days of the inspection [see Tr. pp. 943, 967-968; 979, 985-989]. There was no evidence to the contrary—only a negative inference drawn by Appellees from the absence of these bearings in the documents rescued from the ship. It must be remembered that Appellees, as claimants below, had the burden of proving a statutory violation in order to bring into play the rule of *The Pennsylvania* (See *Walston v. Lambertsen*, 349 F. 2d 660 (9th Cir. 1965)). Viewed in that light this negative inference is of little weight. No one knows what happened to the record of checks of the calibration, it may still be on the vessel, but the testi-

³Tr. p. 104 (Patronis); Tr. p. 365 (Filippone); Tr. p. 1409 (Jensen); Tr. pp. 776-7 (English).

⁴Tr. p. 104 (Patronis); Tr. p. 1417 (Jensen); Tr. pp. 447-450 (Simms).

mony of Kroh and Hall that it existed at the only time relevant to a statutory violation is uncontradicted.⁵

Second, as to the alleged requirement that there be an up to date deviation card, there is no such statutory requirement. Up to date deviation information is something each Master is expected to obtain as he commences each trip [Tr. pp. 539, 845-847, 1075, 1088-1089] and a shipowner is reasonable in anticipating he will do so [Tr. pp. 635-636, 847]. Such a table of deviations is entirely different from the record of calibration checks which is the only record referred to in the statute or regulations (see *Infra* at pp. 9-10).

In addition to all this, there is the FCC certification itself. This Court (Opinion p. 18, fn 30) stated that Appellant could not rely on this certification to show statutory compliance citing *States SS Co. v. The U.S.*, 259 F. 2d 458, 700 (9th Cir. 1957) and *Sabin Towing Co. v. Brennan*, 72 F. 2d 490, 494 (5th Cir. 1934).

The Court, however, failed to distinguish between certificates as they bear on the general issue of unseaworthiness (what was involved in both cited cases) and as they bear on statutory compliance. As to the former such certificates are only evidence of what was done since the ultimate responsibility for seaworthiness rests on the owner, not regulatory bodies.⁶ In the instant

⁵There is a possible inference that this Court believes that because the posted table [Ex. 35] was dated 1957, no check of the calibration occurred in 1961. The posted table, however, was not a record of "checks" of calibration, it was a table of uncompensated errors (see *infra* pp. 9 and 10). To infer that because in 1962 the posted table of deviations was dated 1957, there was no check of the calibration in 1961 is a *non sequitur*, and assumes continued dereliction of duty by the FCC for four years (1958-61) contrary to the presumption that they carried out their statutory duties. (See *United States v. Chemical Foundation*, 272 U.S. 1 at p. 14).

⁶In addition, in *The States* case the owner knew of possible danger and therefore could not rely on regulatory bodies, at least
(This footnote is continued on the next page)

situation, the issue is far narrower, i.e. did the equipment comply with the statute. As to this the ultimate responsibility is that of the regulatory agency, and certification, because of the presumption that an official body carries out its tasks properly (see *Chemical Foundation* case *Supra* in. 5) creates a *prima facie* case of statutory compliance. See also *The Princess Sophia*, 61 F. 2d 339 (9th Cir. 1932) at pp. 347-348 where this court held that the vessel's Canadian certificate was evidence of compliance with Canadian law, and its American certificate sufficient to relieve her "... from further compliance with American law as to lifesaving equipment.", and see *China Union Lines, Ltd. v. A. O. Anderson & Co.*, 364 F. 2d 769 (5th Cir. 1966) at pp. 785 and 786.

There was no finding of a statutory violation (nor even a proposed finding of such violation), and no evidence that one occurred.

IV.

Assuming a Statutory Violation, There Was No Privity or Knowledge.

The only violations claimed are an alleged failure to check the calibration particulars of the RDF, and failure to retain a record of those checks on board for one year. As to these two alleged violations this Court finds privity and knowledge because they were "of several years standing", citing *In re P. Sanford Ross*, 204 Fed. 284 (2nd Cir. 1913); *In re Henry DuBois' Sons Co.*, 198 F. Supp. 400 (S.D.N.Y. 1960) and *The Vestris*, 60 F. 2d 273, 280 (S.D.N.Y. 1932). But each of these cases except *The Vestris* involved obvious de-

without carefully checking to determine what they did, see discussion this Opinion at p. 6; and in *The Sabin Towing* case the issue was exoneration under the Harter Act where in any event the duty to use due diligence to make seaworthy is *non-delegable*.

fects in non-technical aspects of small vessels in close proximity to owners (see Opinion p. 12, fn. 20). And in *The Vestris* managerial personnel knew the vessel was overloaded and knew of the practice of overloading (see Opinion p. 14, fn 23). In contrast, in this case the violation of statute, if it occurred, related to complex electronic equipment serviced under contract by experienced technicians and inspected by the FCC. In analysis of this issue sight must not be lost of the careful distinction this Court drew between exoneration under COGSA where the duty to use due diligence to make seaworthy is nondelegable, and limitation of liability where, provided due care under the circumstances is exercised in the delegation, it is delegable (See Opinion pp. 5-15, particularly at pp. 7 and 9).

With this background, what of the alleged violations. First, if it is assumed that the RDF calibration particulars were not checked, in view of the testimony of the FCC inspector and the RCA technician, there are only two possibilities, either they did not see an appropriate record of check bearings but, for unknown reasons, have conspired to lie about it, or they did see them but they were fraudulently prepared by the vessel personnel. The first option does extreme violence to the normal presumptions respecting official duty (see *supra* at Fn. 5), and is clearly not within the privity or knowledge of Appellant. The evidence is clear that Appellant had instructed its personnel to comply with FCC regulations [Ex. 59], and had engaged RCA to assist in compliance. Appellant could do no more. The second option is also clearly outside of Appellant's privity or knowledge. The checks had to be made at sea [Tr. p. 1003] and the crew had been instructed to do so. In all events, therefore, Appellants had to rely on the crew's report and are no more in privity with the type of fraud that would be involved than they would be with negligent navigation, both of which

would occur at sea beyond their control. Appellant was not required to duplicate the FCC and RCA representatives' work by reviewing the calibration check record. However, assuming they had done so, what would they have seen; simply the same "fraudulent" (on our present assumption) record which they no more could have determined to have been fraudulent than could the FCC inspector or the RCA technician.

Turning then to the second "violation", failure to have aboard for one year a record of the checks of the calibration, the evidence shows [see Tr. pp. 992-993] that such was on board shortly prior to departure when the RDF was certified. This being the case had Appellant duplicated the work of the FCC and RCA men, all they would have seen was a record of checks of calibration.

Even assuming, contrary to fact, that the statutes and regulations required a table of deviations, rather than the record of checks of the calibration of the RDF to be maintained on board (see Court's Opinion pp. 16 and 18, fn 30 where it suggests it so understands the statute and regulations) there would be no evidence to sustain a finding of privity or knowledge. True the posted table was dated 1957, but there is no evidence that these were not the correct deviations for the permanent, but uncalibrated (because they did not exceed five degrees) errors. Indeed, as the uncontradicted evidence shows, application of the posted corrections to the observed bearings in each instance brought the result closer to the true bearings and left the remaining error within the range of expected transient error [Tr. pp. 631-634]. As long as the corrections were accurate they properly remained posted subject to the requirement that a prudent Master check them after departure (which he should do regardless of what was posted) [Tr. pp. 534, 636-637] and a prudent ship-

owner would assume that the Master would do so [Tr. pp. 518, 635]. The only negligence regarding a table of deviations was that of the Master occurring at sea after departure from Mobile. Of this Appellant had no knowledge nor privity.

V.

**Even Assuming a Violation of Statute and Privity
or Knowledge, It Was Not a Cause of the
Stranding.**

First, a failure to check the calibration could not have been related to the stranding if a check of its accuracy would not have shown a need to recalibrate. That is, if the check bearings were within the five degree error acceptable to the FCC, no action would then have been taken as a result of the check. The only evidence [Tr. pp. 642-643] is that the bearings obtained by the vessel on the night of the stranding were all within the allowed tolerance of the true bearing. Thus there is no way this failure, if it occurred, could have been related to the casualty.

Second, the absence of record of the checks of the calibration could have had no proximate relationship to the stranding. The check bearings required by the FCC to comply with the statute and regulations provide little navigational information and are not designed to be used in navigation. The FCC wants to know if the vessel has changed structurally sufficiently to require recalibration [see Tr. pp. 943-944, 946-947, 969-971] and for this purpose have concluded that one bearing in each quadrant will suffice [see Ex. 59, FCC Bul. 1007f]. On the other hand, a table of deviations such as Exhibit 35 contains multiple bearings relative to the ship's head and corrections for those bearings, based on errors not requiring recalibration. To navigate with such a table one corrects the RDF bearings obtained

by reading from the table the amount and direction of the required correction and applying it to the bearing obtained. The record of the check of the calibration of the RDF however, would have only four relative bearings with the appropriate correction, no two of which would be on headings closer than seventy degrees to each other [see Ex. 59].⁷ Since the "required record" could not have been used to correct bearings obtained in navigation, its absence could not have had any effect on the casualty.⁸

⁷Not even coincidence could in fact in this case have made a record of the required checks of the calibration of value in navigation. Exhibit 59 shows the four checks have to be within plus or minus 10° of 45°, 135°, 225°, 315°. The actual bearings obtained were as follows: 1640 Point Sur 000°; 1640 Point Arguello 057°; 1735 Point Sur 356°; 1854 Point Sur 347°; 1854 Point Arguello 024°; 1933 Point Arguello 004°; 2020 Point Arguello 334°. Of these bearings, only two, 1854 bearing on Point Arguello and 1640 bearing on Point Arguello, were closer than 20° to any bearing that would have appeared on the record of checks and only one, the 1640 bearing on Point Arguello was closer than 10° to such bearing. Of the two closest, the 1640 Point Arguello bearing was, in any event, a good one and the fix obtained at that time accurate, and the 1854 Point Arguello bearing was taken at the time of maximum twilight effect and thus should have been discounted. Obviously knowing the error as obtained as much as seven months earlier (within 90 days of the inspection) for a single bearing in the same quadrant no closer to the obtained bearing than 20° gives no guide to what correction to apply.

⁸That neither the statute nor regulations requires a current deviation, or for that matter, any deviation table, Appellant feels has been amply demonstrated (See pp. 3, 4 and 9 *supra*). Even if they did, however, the Trial court's conclusion that the *fixes* were "wildly divergent and inconsistent" and could not be explained by any absence of an up to date deviation table, was indeed correct. The RDF gives only bearings, whether corrected or uncorrected, and the *fixes* are obtained from those bearings by the officers. The bearings were consistent and within a normal degree of accuracy [Tr. pp. 642-3, and compare Finding 8, R. p. 849 with proposed and rejected Finding 7, R. pp. 894-5]. The *fixes*, as a result of negligence of the crew were wildly inconsistent [Tr. p. 525], not the bearings; thus the absence of an up to date table of deviations could have had no reasonable proximate relation to the stranding.

It is respectfully submitted the petition for rehearing should be granted.

GRAHAM & JAMES,
LEO J. VANDER LANS,
DON A. PROUDFOOT, JR.,

*Attorneys for Appellant Waterman
Steamship Corporation.*

Certificate.

I hereby certify that in my judgment the petition for rehearing is well founded and further certify that it is not interposed for delay.

DON A. PROUDFOOT, JR.

APPENDIX.

47 C.F.R. § 8.517(a) and (b) as of 1962.

§8.517 *Requirements for direction-finder.*

(a) To be approved by the Commission, as provided by § 8.516, the radio direction-finder (radio compass) shall:

(1) Be capable of efficiently receiving signals (at least types A2 and B emission) with the minimum of receiver noise, on each radio-channel within the frequency band 285 to 515 kc/s which is designated by the International Radio Regulations for distress, direction-finding, or marine radio beacons;

(2) Be capable of receiving types A1, A2, and B emission, if installed on board ship after January 1, 1940;

(3) Be capable of taking bearings on received radio signals as set forth in subparagraphs (1) and (2), of this paragraph, from which the true bearing and direction may be determined;

(4) Be accurately calibrated for the purpose of taking bearings from which the true bearing and direction may be determined for actual use in maritime radiolocation service and maritime radionavigation service; and

(5) Have a sensitivity, in the absence of interference, sufficient to permit of accurate bearings being taken on a signal having a field strength as low as 50 microvolts per meter.

(b) The calibration of the direction-finder shall be verified whenever any changes are made in the physical or electrical characteristics or the location of any

antenna(s) on board the vessel, or whenever any changes are made in any structure(s) on deck, which might appreciably affect the accuracy of the direction-finder. The calibration particulars shall be checked at yearly intervals or as near thereto as possible. A record of the calibration of any checks made of their accuracy shall be maintained on board the vessel for a period of not less than 1 year from the date of the related action.

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JOSEPH J. BYRNES,

See Vol. 3447

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FILED

MAY 23 1969

WILLIAM H. HICKS, JR.

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WM. MATTHEW BYRNE, JR.
United States Attorney

DAVID R. NISSEN
Assistant United States Attorney
Chief, Special Prosecutions
Division

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012
688-2437

Attorneys for Appellee
United States of America

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WM. MATTHEW BYRNE, JR.
United States Attorney

DAVID R. NISSEN
Assistant United States Attorney
Chief, Special Prosecutions
Division

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012
688-2437

Attorneys for Appellee
United States of America

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Wayne v. New York Life Ins. Co., 132 F. 2d 28 (8th Cir. 1943)	2
Wong Sun v. United States, 371 U.S. 471 (1963)	2
Zweig v. Bethlehem Steel Supply Co., 186 F. 2d 20 (5th Cir. 1951)	1

Federal Rules of Appellate Procedure:

Rule 40

A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAMUEL REISMAN and
JOSEPH J. BYRNES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

TO THE HONORABLE JUDGES: Barnes, Hamley and
Browning of the United States Court of Appeals for the Ninth
Circuit.

Pursuant to Rule 40, Federal Rules of Appellate Procedure,
and this Court's Rule 12, appellee United States respectfully
petitions this Court for rehearing in the above-captioned cause,
and suggests a rehearing en banc.

Oral argument in this matter was heard before Circuit
Judges Stanley Barnes, Frederick G. Hamley, and James R.
Browning. The opinion and decision of this Court was filed on
April 9, 1969, and this petition is filed within the time provided
therefor by provision of Rule 40, Federal Rules of Appellate
Procedure.

GROUND S FOR GRANTING A REHEARING

1. THE DECISION REJECTS A FUNDAMENTAL
RULE OF THE LAW OF AGENCY, AND CON-
FLICTS WITH DECISIONS IN THIS AND
OTHER CIRCUITS
-

Every Court of Appeals in this country has stated and reaffirmed the principle that notice to an agent acting within the scope of his authority is notice to his principal.

Continental Cas. Co. v. United States,

337 F.2d 602 (1st Cir. 1964);

Metz v. Tusico, Inc. , 167 F.Supp. 393,

aff'd 260 F.2d 957 (1st Cir. 1959);

Dawn Donut Co. v. Hart's Food Stores, Inc. ,

267 F.2d 358 (2nd Cir. 1959);

Higgins v. Shenango Pottery Co. , 256 F.2d 504

(3d Cir. 1958);

McSweeney v. Prudential Ins. Co. of America,

128 F.2d 660 (4th Cir. 1942),

cert. den. 317 U.S. 658;

Zweig v. Bethlehem Steel Supply Co. , 186 F.2d 20

(5th Cir. 1951);

Bimini Run, Ltd. v. Belcher Oil Co. , 336 F.2d 184

(5th Cir. 1964);

Schram v. Burt, 111 F.2d 557 (6th Cir. 1940);

Union Ins. Exchange, Inc. v. Gaul, 393 F.2d 151

(7th Cir. 1968);

Wayne v. New York Life Ins. Co., 132 F.2d 28

(8th Cir. 1943);

Dubuque Stone Products Co. v. Fred L. Gray Co.,

356 F.2d 718 (8th Cir. 1966);

United States for Use of Ascher Corp. v. Bradley-

Dodson Co., 281 F.2d 676 (9th Cir. 1960);

Wagner Tractor, Inc. v. Shields, 381 F.2d 441

(9th Cir. 1967);

Great American Indemnity Co. v. First National

Bank, 100 F.2d 763 (10th Cir. 1939);

Bailey v. Gulf Ins. Co., 389 F.2d 889 (10th Cir. 1968);

Bowen v. Mount Vernon Savings Bank, 105 F.2d 796

(D. C. Cir. 1939);

Earle Restaurant v. O'Meara, 160 F.2d 275

(D. C. Cir. 1947).

Principals creating a criminal agency are bound by the same rules as are principals in civil cases.

Las Vegas Merchant Plumbers Association v. United

States, 210 F.2d 732 (9th Cir. 1954);

United States v. Luros, 260 F.Supp. 697 (D. C. Ia.

1966); rev'd on other grounds, 389 F.2d 200

(6th Cir. 1968);

Wong Sun v. United States, 371 U.S. 471, 488-492

(1963).

The Court's decision herein, and the sole precedent for it, Phillips v. United States, 356 F.2d 297 (9th Cir. 1965), are in

conflict with every other reported case which touches on the issue involved. For example, in Irwin v. United States, 338 F.2d 770 (9th Cir. 1964), there was no evidence that defendant Irwin had personally read any complaint letters, but they were received against him, and this Court said of them:

"Complaints received by M. O. D. from franchise holders sometimes averaged fifteen per day. Franchise holders who sought refunds after the first expenditure of \$29.95 were usually told that there could be no refund until the franchise holder had made at least one purchase of the additional materials. Some purchasers were unable to obtain materials for which they had paid until after several prompting letters. Some franchise holders repeatedly asked M. O. D. for advice and assistance but received no reply." (p. 773)

The clearest case on the matter of complaint letters is United States v. Press, 336 F.2d 1003 (2d Cir. 1964), in which it was held that complaint letters were admissible against the defendants if they were received by their company, and were inadmissible only if they were not called to their company's attention. In the Press case, I. Press, Fry, L. Press, S. Stuchell and W. Stuchell were indicted for mail fraud along with three corporations, one of which was named "Buy-Rite." Evidence of numerous victim complaints was received at trial. Of these complaints, some were "called to Mrs. Stuchell's attention" (p. 1011) by trade association communications which merely summarized the nature of the complaints, and

some were processed by employees in "the two-man 'correspondence unit' " of Buy-Rite. So far as the proof showed, none were actually seen by any of the appealing defendants. The Court of Appeals upheld the admissibility of the complaint evidence received by "Buy-Rite" on the ground that it had been called to the defendant's attention, stating:

"Of course, evidence that complaints had been received would not have been admissible to show that members had, in fact not received catalogs, merchandise or refunds. But evidence that there had been complaints which were called to appellants' attention was relevant on the issue of appellants' intent and good faith. The inference might readily be drawn that, since appellants knew that members were being misled by solicitation literature and that there was general dissatisfaction with the manner in which Buy-Rite conducted its affairs, continued operation despite this knowledge showed the existence of a scheme to defraud." [emphasis added] (p. 1011)

* * *

"The some 200 complaints received prior to the end of 1961 were sufficient to put defendants on notice that their representations were being so interpreted as to make them misrepresentations." [emphasis added] (p. 1012)

In pointing out the inadmissibility against the defendants of

complaints not called to their company's attention, the court said:

"Reference of witnesses to complaints that were not brought to appellants' attention stand on a different footing. [FN³ "This category includes those complaints that Hicks did not call to Buy-Rite's attention; those that Hicks said were still being received at the time of trial . . . ; and those that were sent directly to Postal Authorities."] That there were member complaints in substantial volume which were called to Buy-Rite's attention was disclosed early in the trial" (p.1012)

* * *

"Because of the prominence of the complaints called to Buy-Rite's attention that were properly in evidence, the fact that there was mention of other complaints not specifically called to Buy-Rite's notice did not constitute error sufficiently prejudicial to demand reversal. . . . the number of complaints whose existence was not in some way brought to Buy-Rite's attention was so small in comparison to the number of which it was aware that any error could hardly have been prejudicial." [emphasis added] (p. 1013)

The reading and handling of complaints by some members of a common scheme is as much an act admissible against all, as any other activity. As was said in Reistroffer v. United States, 258 F.2d 379 (8th Cir. 1958), "we find no error in admitting the . . . subsequent correspondence showing the handling of

complaints, accusations and demands of purchasers to get their money back. The evidence tended to show the scheme in operation."

This Court holds that since complaints bear on the issue of intent, they are admissible only if it has been proved that each defendant "had actual knowledge of the documents," but gives no reason why complaints should be treated differently from other evidence bearing on intent, such as the receiving of payments, contents of advertising, and contents of lulling letters. That "personal knowledge" is not required for such "intent" items is clearly demonstrated by this Court's opinion in Harris v. United States, 261 F. 2d 792 (9th Cir. 1958), cert. den. 360 U S. 933, in which it was held:

"But the writings, literature, lead cards and lulling letters sent out by or under the direction of some of defendants and the manner of usage thereof were such that the jury had a right to consider these as evidence of bad faith and fraudulent intent upon the part of all defendants." [emphasis added] (p. 795)

Even with respect to proof of the essential element of the use of the mails, "personal knowledge" is not required. In Kann v. United States, 323 U.S. 88 (1944), the defendant claimed that he had no knowledge that certain checks would be sent through the mails. The Supreme Court said:

" . . . while there may be some question as to whether the defendants may be said to have 'caused' the mailing of the checks, we think it a fair inference that

those defendants who drew, or those who cashed, the checks believed that the banks which took them would mail them to the banks on which they were drawn, and, assuming the petitioner participated in the scheme, their knowledge was his knowledge." [emphasis added] (p. 93)

Since there is no rational distinction between complaint letters and other documents bearing on intent, the court should not abrogate the law of agency to create an exception for complaints. In fact such an exception can never be applied in prosecutions of corporations, and there is no reason why a corporation should be charged with the knowledge of its agents while an individual principal is excused therefrom, particularly since the latter may choose to act directly or through others, while the former has no choice at all.

The principles of agency, which provide the basis for the law of conspiracy and common scheme, are designed to prevent a principal from insulating himself from responsibility by obtaining agents to act for him. Bowen v. Mount Vernon Savings Bank, 105 F.2d 796 (D.C. Cir. 1939). This avoidance of responsibility is precisely what this Court's decision will not only permit, but encourage. Under the Court's new rule a principal has complete power to choose whether he will accept the required "personal knowledge" of complaints. Nothing the defrauded victim can do will bring such knowledge to a principal who declines to read the complaints sent to him. Take, for example, the undisputed facts concerning defendants Reisman

and Byrnes:

- (1) They and their co-defendants hired and paid the employees who handled the complaints;
- (2) They instructed employees on what procedures to follow when complaints were received, and discussed the complaints on an individual basis with them.
- (3) Reisman told employee Manzin to notify him of complaints as they came into the office and she did so.
- (4) They met with their co-defendants and decided how complaints and refund requests would be handled;
- (5) Both knew complaints received by the company were being handled by attorney Finell and attorney Ross and were furnished written lists of refunds made pending and denied;
- (6) Reisman knew that "the company received a flood of complaints;"
- (7) All complaint letters were readily available to Reisman and Byrnes in the company office which they frequented, and at the office of Reisman's suite-mate and friend, attorney Ross who was hired to answer the complaints;
- (8) Documentary evidence shows that Reisman and Byrnes personally read a number of the individual complaint letters. [See Appellee's Brief, pp. 53, 54 and the Appendix to this Petition]

In the face of the foregoing evidence that appellants had full knowledge that numerous purchaser complaints were being received, and that appellants had full opportunity to examine the letters if they chose, this Court finds that: "Direct proof of actual knowledge by the two appellants was limited to a scattered few complaint letters," and incorrectly states that "the jury was erroneously permitted to assume that each of the appellants had knowledge of numerous letters complaining of misrepresentations because such letters were found in the company files or were known to persons other than defendants connected with the enterprise." This can only mean that the Court is requiring personal knowledge of the words in each particular complaint before it can be admitted in evidence. Creators of fraudulent schemes will gladly avoid such enlightenment by simply declining to read the complaints about which they may otherwise be thoroughly informed, as the defendants obviously were in this case. The cultivation of ignorance as a means of avoiding incriminating knowledge has regularly been held to be ineffective. For example, in Stone v. United States, 113 F.2d 70 (6th Cir. 1940), it was said:

"Where guilty knowledge is an element in the offense, as in conspiracy charges and the use of the mails to defraud; the knowledge must be found from the evidence beyond a reasonable doubt, but actual knowledge is not required; it may be inferred. Scienter may be inferred where the lack of knowledge consists of ignorance of facts which any ordinary person under similar

other circuits. No reason has been suggested and none exists as to why complaints should be treated differently from other evidence of intent. Such an erroneous rule will promote fraud by insulating perpetrators from responsibility for their schemes.

2. THE COURT HAS MISAPPREHENDED THE
FACTS CONCERNING THE EFFECT OF THE
COMPLAINT LETTERS

In finding that admission of complaint letters was prejudicial error, the Court states that "there was little dispute as to the facts at trial" and that intent was the real contested issue. Actually, there was virtually no disagreement as to what the defendants intended. They intended to sell certain land by making certain representations. The "hotly contested" issue was the factual one of whether these representations were true or false as can be readily determined by reading the final argument of the defense counsel and prosecutor.

The Court also underscores the issue of intent by stating that the jury "required some thirty hours of deliberation, over a period of four days, to reach its verdict." In view of the fact that trial involved thirteen weeks of testimony from two hundred witnesses and literally thousands of exhibits, and that the jury had obviously reached its verdicts rapidly as to appellants, and spent most of its time deliberating the case of defendant Benaron on whom the jury was unable to agree, the Court's assumption is unfounded.

The Court says of the complaints that "Hundreds of them were admitted" and "the content of these letters was extremely damaging." This reflects an uncritical acceptance of defendant's brief. An examination of the exhibits themselves reveals this claim to be totally false. The total number of letters that can be considered "complaints" is less than two-hundred and fifty. Of these many simply ask for refunds or inquire about unfavorable publicity. Defendant Reisman's opening brief prints the strongest complaints available. These thirty-eight, and some of the others, state or suggest that the land was misrepresented to the purchasers in various ways. These statements are the only respect in which the letters could be considered at all "damaging". However, precisely the same complaints, in the same volume, were received in evidence apart from the complaint letters themselves. This is so because the complaint letters are not isolated documents, but are merely one document in a complaint file which contains other forms showing the nature of the complaints. For example, after a complaint letter was received, the company mailed a questionnaire to the purchaser. These completed questionnaires contain the same complaints as in the initial letters, and were seen by Reisman. [Ross, 11622]. Also, "Refund Request Control" sheets list the nature of the misrepresentations alleged by the complaining buyer. Thus, the complaint letters add nothing to other complaint evidence to which appellants have made no objection. Also, evidence of complaints of misrepresentations in sales was received in the form of: a Real Estate Commission

Order halting sales, a complaint letter from the Governor of Nevada, and a Location Analyst's report, to say nothing of the more than fifty purchasers who testified to their complaints about misrepresentation. Under these circumstances, the complaint letters were not only not "extremely damaging", but in fact were completely cumulative and harmless.

Respectfully submitted,

WM. MATTHEW BYRNE
United States Attorney

DAVID R. NISSEN
Assistant United States Attorney
Chief, Special Prosecutions
Division

Attorneys for Appellee
United States of America

APPENDIX

SAMUEL REISMAN

1 "I have discussed this with some
2 friends of mine before I bought the land
3 and since I purchased the land and they
4 as well as myself feel deeply that this
5 was misrepresentation on your behalf to
6 make this purchase therefore I wish to
7 cancel my contract with your corp." and so on.

8 The letter of Mr. Rockel of November 8,
9 1960, reads:

0 "This is to advise you that com-
1 plete refund has been made to Mr. Tex
2 D. Munson."

3 That is correct, is it?

4 A Yes.

5 Q With reference to these matters, Mr. Reisman,
6 as far as you recall, are these the complaints brought to
7 your attention in connection with this matter, from, let
8 us say, the start of the sale in 1960 of this land and
9 through November of 1961, with the exception of one mat-
0 ter here of the Real Estate Department, which I will come
1 to?

2 A Yes, sir, to the best of my recollection
3 these matters right in front of me are the sum total
4 of it.

5 Q Did you some time on or about September 1961

1 make any request of Mrs. Manzin to be notified of
2 complaints if any came in?

3 A Yes.

4 Q To be brought to your attention?

5 A Yes, sir.

6 Q These were the ones that were referred to
7 you thereafter, is that correct?

8 A Yes, sir.

9 Q Now, on November 17, 1961, was a letter
0 written to you from Mr. Scholfield from the Real Estate
1 Division, relative to a matter as to whether or not five
2 or more parcels had been sold to one individual?

3 A Yes.

4 Q And is this the letter?

5 A Yes, sir.

6 Q Are these papers all with reference I have
7 here clipped together with a paper clip, are they with
8 reference to that matter from Mr. Scholfield?

9 A Yes, sir, these contain the entire file
0 in that matter.

1 MR. HUNT: For the record, the papers
2 consist of a letter of November 17, 1961, from Scholfield
3 to Reisman relative to:

4 "It has come to our attention that

5 Gamble Ranch may have sold five or more parcels

Those are the complaints I was aware of and of which I have a record in my file.

Q In connection with your treatment of these complaints, Mr. Reisman, did you have some discussion with Mr. Rockel as to what your wishes were with reference to the handling of these matters?

A Yes.

Q Tell us briefly what your discussion with Mr. Rockel was?

A I told Mr. Rockel in my opinion the moment a complaint was brought to his attention that he should immediately check with the sales manager and the salesman involved and have the matter handled that day, to get a complete investigation as fast as possible so that he could then get a report immediately, and after he had made his valuation he should then make a determination ~~as to how to handle the matter.~~

Q There has been some testimony, Mr. Reisman, relative to the cash condition of the Company and relative to the matter of development, other matters of that kind, I wish to touch on briefly with you.

In 1961 with reference to this Company did you have some discussions with Mr. Benaron, Mr. Byrnes and others, shareholders of the Company, relative to the matter of finances?

That I wanted this situation to continue, I wanted to be certain that the sales personnel did not make any misrepresentations of any kind and that I wanted them to review all of the Company literature with the sales personnel, each one individually, and if there was any question in their minds about whether or not the salesmen would follow the proper instructions they were to fire them immediately.

I also told him that I wanted them to be certain that with respect to any complaints of any kind, that immediately upon receiving them they were to forward them to Mr. Rockel's office, and I wanted Mr. Rockel, and I instructed him in the presence of these sales managers to be certain that these customer complaints were investigated and checked immediately the same day, that if they found there was anything at all, any substance of any kind to the complaint there was a full refund to be made immediately.

Q Did you state to Mr. Jacobsen, in substance, "I had nothing to do with the Pace Productions film strip and I only heard of it recently"?

A No, sir, I did not make that statement.

Q What statement did you make?

A Mr. Jacobsen asked me what I had to do with the DuKane film strip and I told him at that time

1962, with reference to the matter of complaints or alleged complaints of any purchasers, were you relieved as an attorney of any duty with reference to any investigations or handling of such complaints?

A I was completely relieved.

Q Will you explain the circumstances and when?

A After the situation arose in January of 1962 when this publicity came about, as a result of Mr. McBride's efforts to -- apparently he was in a fight with Mr. McDonald and he issued this publicity release, and the Company received a flood of complaints. It was like a run on the bank.

At that point, as you heard Mr. Byrnes' testimony, Mr. Byrnes consulted the law office of Wyman, Finell & Rothman, and they handled that matter at that time, until at a subsequent date they turned the matter over to Mr. Ross to be handled in his individual capacity.

When Mr. Ross took that assignment over I had absolutely nothing to do with it. Mr. Ross' fees are separately separate from mine. I never discussed the matter with him. I never looked at his files. Whatever he did in that connection he did on his own as a lawyer.

Q And he did it as a lawyer for the Company?

A Yes, sir, and he was paid for it.

at the Gamble Ranch and it was misrepresented."

And then it goes on to say that the land was not surveyed.

MR. HUNT: May I have the name of that file, please?

MR. NISSEN: The name is Dowler.

Q I notice that the cancellation is dated October 19, 1961.

Do you know why Mr. Rockel would refer to you some of the complaints he did and not refer this one?

A I have no idea at all. If --

Q Is it -- excuse me.

A If Mr. Rockel felt it was in his jurisdiction to refer a matter to me, he referred it. If he didn't, he handled it himself.

Q Did I not understand you to say, sir, some time after July 1961, when the Governor complained, that you told Mr. Rockel to refer all the complaints to you?

A No, I didn't tell him that.

Q Oh. I thought you had, sir.

A I told him to immediately handle them and make sure the customers were satisfied. And I also gave him instructions on what to tell the sales people and the sales managers.

THE COURT: Were there any instructions as

to what Mr. Rockel was to handle, Mr. Reisman?

Were there any instructions Mr. Rockel was to handle this particular type of a complaint and this particular type was to go to you?

THE WITNESS: No, not at all.

THE COURT: Nothing definitive about it?

THE WITNESS: Mr. Rockel was the general manager and vice president in charge of the operations and his instructions were to make certain that he handled all the matters within his best discretion. If he needed any assistance from the legal people of my office, he would call us.

BY MR. NISSEN:

Q Here is the Engle file, 3-887. I notice the purchase date is July 15, 1961, and a letter of complaint to the Company dated August 2, 1961, about a month later.

The letter says in part:

"We have just returned from a visit to Gamble Ranch. We find you have over-sold your land. Improvements that you stated were there, were not! Also the land you sold us was nothing like the pictures you showed us. Therefore we feel this contract is not satisfactory," et cetera.

And then there is a PS:

JOSEPH J. BYRNES

1 of Mr. Rockel, who was the general manager, so that he
2 would request the things at the Ranch, is that correct?

3 A That is correct.

4 Q Were you trying to spin your wheels, Mr.
5 Byrnes?

6 A No, I was very definitely interested in
7 the improvements going into the Ranch.

8 Q What was the refund policy of the Gamble
9 Ranch prior to December 1960 or January -- excuse me --
10 January 1962?

11 A The refund policy was to return the money
12 of any complainant who had purchased land prior -- 30 days
13 prior to the purchase date for any refund whatsoever.

14 If there was a complaint that was over 30
15 days old it was the immediate policy to send the sales
16 manager out to see the purchaser. If they couldn't
17 satisfy him, to refund his money.

18 Q Did you ever have any complaints with
19 reference to alleged misrepresentations, that you know of?

20 A Yes, I know of one complaint that came
21 in and -- well, they went out to see him. It was an
22 Asin and Jarrett sale.

23 They went out to see this gentleman. His
24 name was McCann, and Asin and Jarrett personally talked
25 to me at this time.

1 They said they definitely did not mis-
2 represent. They would go down to the Real Estate Commis-
3 sion.

4 I told Mr. Rockel if this gentleman said
5 there was anything wrong, to find out what. And I think
6 that Mr. Escarzaga or Mr. Rockel went out to see him and
7 talked to him and came back convinced there had been no
8 misrepresentation, but returned his check to him.

Q Gave him his money back?

A Yes.

Q Do you know if anybody was dismissed or
fired from the organization for allegedly misrepresenting
the property?

A Yes, I believe there were two salesmen
discharged.

Q Who were they?

A A Mr. Budd and a Mr. Rae.

Q Do you know where they sold from, what
office?

A Out at the Wilshire office.

Q Here in Los Angeles?

A That is right.

Q Now, some time in 1962 did you have a
discussion with Mr. Finell concerning the policy of the
Gamble Ranch in refunds?

1 A Yes, after the adverse publicity and we
2 started getting quite a few telephone calls and letters
3 started to pour in.

4 Q Do you recall when this was?

5 A January 10th, 11th or 12, somewhere around
6 there right after the publicity, a matter of a few days.
7 It might have been a day or two or three or four.

8 I went up to see Mr. Finell and I told him
9 about the problems, showed him the publicity, had a copy
0 of the publicity with me if he had not seen it. I think
1 I had a copy with me.

2 I asked him what to do. He suggested that
3 he would make up a form and that we send this form out
4 to all complainants, which we followed through on.

5 Q 3-268 already in evidence, a letter of
6 January 22, 1962, to Mr. Finell from yourself, Mr. Byrnes,
7 as president of the Gamble Ranch Investments.

8 It says:

9 "Dear Mr. Finell:

0 "Pursuant to your request, we have
1 herewith compiled all sales cancellations
2 and refunds since the inception of this
3 company up until December 31, 1961. We
4 trust this is the information you desire.

"Yours very truly

1 This is a letter you sent to Mr. Finell,
2 pursuant to his request?

3 A Yes, it is.

4 Q There follows 14 pages of "GAMBLE RANCH
5 INVESTMENTS CANCELLED AND REFUNDED CONTRACTS", with a
6 tape total of \$34,955.00. This is 3-268.

7 I show you 3-2029-A, a letter of March 16,
8 1962, to a Mr. Robert McDonald, signed by Maria Manzin,
9 Assistant Secretary.

0 There is attached thereto a letter from
1 Wyman, Finell & Rothman -- it is the original -- dated
2 March 16, 1962, to your attention, Mr. Byrnes, signed
3 Marvin Finell.

4 I will ask you particularly if you are
5 familiar with the second document, which is severally
6 designated 3-2029-A.

7 A Yes, I remember that document.

8 MR. WILLENS: I am not sure, your Honor,
9 whether 3-2029-A came into evidence with the -2029.

0 THE CLERK: It is in evidence.

1 MR. WILLENS: It is in evidence?

2 THE CLERK: Yes.

3 MR. WILLENS: Fine. Thank you.

4 Reading just briefly from that letter of
5 March 16th to Pacific Westates:

1 "Gentlemen:

2 "Pursuant to your request, this letter
3 is written to advise you of our activities
4 regarding the claims for refund which have
5 been filed during the year 1962 by purchasers
6 of land in the Gamble Ranch.

7 "At your request we have reviewed
8 each such request individually including
9 any correspondence and all of your records
10 pertaining thereto, as well as answers to
11 questionnaires prepared by our office for
12 each such claimant to fill out. Upon the
13 basis of our examination of these files,
14 in every instance in which, in our opinion,
15 based upon the documents before us, a valid
16 legal reason for granting such refund has
17 existed, we have advised the company to
18 grant the claimant refund. Consistent with
19 company policy, we have also advised the
20 granting of every refund claim filed with-
21 in one month of the date of purchase of
22 a parcel of land regardless of whether
23 or not legal basis existed for such refund
24 claim. In other instances we have advised
25 the company that in our opinion no legal

1 basis for granting a refund existed
2 and have advised the company to decline
3 such requests."

4 Q Mr. Byrnes, did you at all instruct Mr.
5 Finell how he was to handle these refunds?

6 A No, sir. As a matter of fact, when I
7 first brought the files up to his office, I informed Mr.
8 Finell not to ask my opinion. I wanted him to make an
9 opinion on his own. I didn't want to try to sway him
0 in any way whatsoever.

1 Q I overlooked asking you about this document,
2 1-445, which is entitled "CONFIDENTIAL REPORT TO STOCK-
3 HOLDERS ON GAMBLE RANCH SUBDIVISION & DEVELOPMENT AND
4 GENERAL OPERATIONS".

5 It is dated 30 March 1961. It bears the
6 signature of N. T. Rockel, Vice President and General
7 Manager.

8 Were you familiar with this document,
9 Mr. Byrnes?

0 A Yes, I was.

1 Q To whom was this document distributed,
2 if you know?

3 A To the stockholders of Gamble Ranch.

4 Q Was this a document generally disseminated
5 to the public, as part of any sales program?

MARVIN FINELL

a few months after the firm was retained, were you called upon to take on an additional or secondary role in connection with Gamble Ranch?

A Yes, I was.

Q Can you fix the approximate date of that meeting?

A It would be on the day or the following day there was a newspaper article regarding the willingness of Gamble Ranch to give refunds to any purchaser who was dissatisfied.

Q It might help you -- at least we have all been told now that January 9, 1962 or January 8, 1962, one of those two dates was the date of that publicity.

I take it your visit with the Gamble would be about the next day, the 9th or 10th?

A That is correct.

Q And who counselled with you on that day?

A Joe Byrnes.

Q And where was the meeting?

A In my office.

Q Can you give as best you can recall the substance of that conversation?

A Yes.

Mr. Byrnes came into the office and he showed me an article, which I believe had appeared in the

Los Angeles Times, and the article stated that, as I recall, there had been a representation in connection with a hearing on complaints regarding fraud, or something of that nature, by Gamble Ranch, that anyone who was dissatisfied could receive his money back.

He discussed with me the problem of handling the complaint he felt the Corporation was going necessarily to be flooded with.

On reading it, it was quite clear that everybody who had ever purchased the property, regardless of the reason for his dissatisfaction, was going to now seek a refund if he saw the article in the Times.

He asked me how, in my opinion, the matter should be handled, that is, the matter of the complaints that would come up at that time.

Q Up until that time had the firm had anything whatever to do with the question of customer activities, customer complaints?

A No, nothing.

Q Go ahead.

A And he told me that in the past it had been policy of the Ranch to make refunds whenever anybody complained. And particularly in all instances they had given refunds if the complaint had been within the first month of the purchase.

1 But under the present circumstances, we
2 concurred that it was not going to be feasible to give
3 refunds to everybody who asked for them.

4 I suggested to him, in order to determine
5 what refund complaints or requests were based upon mis-
6 representation and which ones were dissatisfaction with
7 either inability to make payments in the past or from
8 reading the newspaper article which connected the Ranch
9 with claims of fraud, that I prepared a questionnaire
10 to be sent out to everybody who had sent in a subsequent
11 complaint requesting a refund.

12 Q Now, was this your suggestion, that the
13 questionnaire be filed?

14 A It was.

15 Q Go ahead, sir.

16 A I prepared the questionnaire, and I assumed
17 that copies of it were made by the Company.

18 When complaints were received they were --
19 the sender of the complaint was sent a letter which I
20 had drafted, along with the request that he fill in the
21 enclosed questionnaire.

22 When the reply came in, then the entire file
23 was given to me by Mr. Byrnes and someone else who was
24 working out there at the office of Gamble Ranch at that
25 time, with authorization to me to handle it as I thought

proper.

Q Now, that somebody else, I think, if it were to refresh your recollection, was probably Mr. Rockel.

A Mr. Rockel, yes.

Q Did you pass upon these refund claims thereafter, independent of any of the defendants in this case?

A My instructions from Mr. Byrnes were to handle them the way I thought was proper to handle them, and I would not have handled them in any other way, in any event.

Q For how long a period of time did you maintain the role of handling these complaints?

A Two, three or four weeks, until the pattern of the responses came clear, and I had handled quite a few of them, and thereafter it was merely a matter of handling them in accordance with a pattern.

Q Ultimately I think they were turned over to another firm, back to Mr. Ross, is that correct?

A I don't know. I told Mr. Byrnes that somebody in the Gamble office themselves could handle them, so far as I was concerned.

Q Who was it that suggested in that meeting, you or Mr. Byrnes, that the tests for the refunds should be based on the question of misrepresentation?

A Me.

Q Was that your independent judgment?

A Yes, sir.

Q Did you tell Mr. Byrnes why they should do it that way?

A Yes.

Q What was your explanation to him?

A It was my opinion that if any other method of handling it were used the entire operation was going to collapse.

Q Is that because of the publicity that you had -- which had been brought to your attention?

A Yes, sir.

MR. NISSEN: To which we will object, your Honor. I think counsel's partner could probably answer without a leading question.

MR. ROTHMAN: I am sure he could. I will try to avoid it.

THE COURT: Yes, avoid leading questions.
BY MR. ROTHMAN:

Q If I may go back now to your Corporation Commission activities.

I want you to examine, Mr. Finell, Exhibit ED in evidence, which is correspondence between you and the California Division of Corporations, and then the

BERTRAM H. ROSS

1 Q Some time in that interval?

2 A Some time in that interval. The employment
3 was arranged basically at the request of Wyman, Finell &
4 Rothman office, and Mr. Byrnes and Mr. Benaron.

5 Q Your employment at that time was with
6 reference to matters with the Real Estate Commissioner,
7 for one thing, is that correct?

8 A That is correct.

9 Q And at that first employment or at the time
0 you commenced to assume such duties as independent counsel,
1 do you recall, sir, whether or not your duties encompassed
2 other matters at the particular moment or was that the
3 particular specific matter at the time?

4 A I can't say.

5 I think basically there were two areas I
6 was representing the Company in connection with, and
7 that was with the Real Estate Division and with the handling
8 of complaints, because prior to my handling the complaints
9 there was a circular letter sent out to those complaining
0 by the Wyman office, and I took over whatever files they
1 had or lawsuits, so I would say those were the two areas
2 at that time.

3 Q All right, sir.

4 MR. HUNT: Now, with reference to the letter
5 of June 1, 1962, I would like to offer the letter which

1 and dated April 27, 1962, by John W. Carey, vice president
2 of Pacific Westates and by Pete Ludwig and Kay Kimber.

3 You were familiar with that, were you
4 not?

5 A Yes, sir.

6 Q Now, I think I called your attention yester-
7 day -- I am not quite sure -- to Exhibit 3-2109 relative
8 to your being forwarded a certain letter pertaining to
9 refunds and listing them. I am sure I did.

10 Did you from time to time during the period
11 you were handling these matters have complaints receive
12 some communications from the Company forwarding to you
13 letters from purchasers and requesting you proceed to
14 communicate with the purchasers as the lawyer and in
15 your judgment attempt to settle, deny the request or
16 dispose of it that you as a lawyer believed to be the
17 proper way to do it?

18 A That is correct.

19 In addition to receiving letters I insisted
20 that the Company supply me with a sheet indicating the
21 complete history of the particular contract.

22 I also wanted a copy of the Public Report
23 signed by the customer and any other information in the
24 file that would be helpful in ascertaining the status
25 of that particular contract.

1 And the document now being examined by Mr.

2 Nissen is a carbon copy of that summary, and the letter
3 dated March 1, 1963, is signed by me. It was dictated
4 by me and was by my office forwarded through the mails
5 to Mr. Rothman.

6 MR. HUNT: At this time, your Honor, I
7 would offer the letter of March 1, 1963 and the list of
8 defendants' next in order.

9 THE CLERK: Defendants' ER for identification.

10 (Documents were marked
11 Defendants' Exhibit ER
for identification.)

12 MR. HUNT: I offer them into evidence.

13 THE COURT: All right. ER is ordered in
14 evidence.

15 (Documents marked Defendants'
16 Exhibit ER were received
in evidence.)

17 MR. HUNT: I think they should be combined.

18 MR. NISSEN: Yes. That is fine.

19 BY MR. HUNT:

20 Q In this letter, Mr. Ross, you state:

21 "Dear Frank:

22 "At long last I have been able to
23 prepare a summary of all complaints serviced
24 by this office since last July, which should
25 be helpful to all of us in any discussions

1 that we have in the future either with
2 Holly Corporation or with Mr. Whelan's
3 office.

4 "The enclosed list covers all com-
5 plaints that have crossed my desk up to
6 March 1, 1963."

7 I take it from this letter, Mr. Ross, it
8 refreshes your recollection that complaints you handled
9 were for a period of about July 1962 to the first of
10 March 1963.

11 A Yes.

12 I was in error. I must have been in error
13 when I thought it was to the end of '62 yesterday, but
14 apparently it lapped over into the early part of 1963.

15 Q (Continuing reading)

16 "I wrote you a letter separately out-
17 lining any lawsuits that are pending
18 and according to my best recollection
19 there are only nine lawsuits involving
20 land contract purchasers.

21 "As I glance over the list I am
22 pleased to note that only half the
23 complaints have been settled and that
24 settlements are pending on about 25%
25 more, leaving a very small number that

1 have not been resolved.

2 " I am sending a copy of this letter
3 and a copy of the within list to Stan Weiss.

4 I don't have enough copies to send one on
5 to Joe Benaron, but suggest that you dupli-
6 cate the within list so that he may also
7 have a copy of the same.

8 "Sincerely yours,

9 "BERTRAM H. ROSS"

10 Q Then as to the attached list, it appears
11 to be in alphabetical order, the name and address of the
12 purchaser, the dollar amount of the contract, the amount
13 paid on the contract and the disposition of the complaint
14 of the purchaser, that is to say, whether it has not been
15 resolved, whether it is still pending or how it was
16 settled, if it was settled, or if it was rejected, is
17 that correct, sir?

18 A That is correct.

19 Q Without going through this list, approxi-
20 mately, Mr. Ross, during the period of time that you
21 were acting as counsel for the Company, in connection
22 with the complaints that purchasers sent in, from the
23 period you have outlined, from about July to the first
24 of March, July '62 to the first of March 1963, how
25 many such complaints, if you recall, or from your

1 records you can state that you handled?

2 A Looking at the list I see there were
3 269 summarized, so I would say that there were that
4 number, and there were some lawsuits. I don't think
5 there were over ten or twelve lawsuits, but without see-
6 ing the letter I referred to, which outlined the specific
7 suits and the status of them, I don't want to be more
8 specific than that.

9 Q You wrote another letter outlining these
10 suits, the specific suits, and you indicated in this
11 letter that there are pending nine lawsuits, to the
12 best of your recollection.

13 A And that was correct as of that date.

14 Q In reference to your statement as to the
15 disposition of the complaints, as you outlined, I take
16 it this was - -

17 ' This percentage that you computed, it is
18 estimated from the files that you were referring to?

19 A Yes.

20 I will rely on my letter. I couldn't tell
1 you now.

2 Q Now I wish to take you back again, Mr.
3 Ross, to the month of July 1961.

4 Do you recall an occasion where there came
5 to your attention a letter from the Governor of

1 the Commission.

2 THE COURT: A letter to whom?

3 MR. NISSEN: A letter from Mr. McDonald to
4 Mr. McBride, sir.

5 Q Did he ever tell you that, sir?

6 A If he did, I don't remember at this point.

7 Q And he never told you then, sir, his letter
8 or his reading of it ever mentioned a requirement of mis-
9 representation as the basis for a refund?

10 A I have no --

11 If you will show me that letter, it will
12 refresh my recollection.

13 Q I don't have the letter he sent to you,
14 if in fact he sent one. I only have his letter to the
15 Commission is all.

16 I notice also a letter - it is not a letter,
17 but a memo. Excuse me. It is Defendants' EO, your memo
18 to Mr. Reisman on March 29, 1962. That is about the time
19 -- in fact, it is the same date as your letter to Mr.
20 McDonald asking him to write that statement consistent
21 with the truth and consistent with your views.

22 And you say in the third paragraph of
23 your memo to Mr. Reisman:

24 "On the advice of Benaron and Byrnes

25 I have sent Block a copy of the refunds given

1 and in process and I have likewise written
2 about McDonald to get a letter out setting
3 forth the representations he made to the
4 Nevada Real Estate Commission. I re-
5 viewed with Bob our understanding of what
6 he said and I am sure his letter will be
7 consistent therewith."

8 At this time you still didn't know what
9 Mr. McDonald had told the Commission, did you?

10 A This is dated the same date of my letter to
11 Mr. McDonald.

12 I don't have a recollection of it, what Bob
13 had told me.

14 Q You still were sure it would be consistent
15 with what you told him you had told --

16 A No, I was hopeful it would be, but I was not
17 asking him to distort the truth, Mr. Nissen.

18 Q I show you a letter in the same file,
19 2-1266, Mr. Ross, marked C, to Mr. McDonald again from
20 you, dated March 26, 1962.

21 Now, that refers to a list of refunds which
22 you are enclosing and you tell him what the list includes
23 and you state:

24 "I think the Nevada Real Estate
25 Commission will realize that we have done

a substantial job and that any statements to the contrary are negatived by the enclosed documents."

Meaning the list of refunds made.

A That is right.

Q I think you say there the actual cash refunds exceed \$33,000.00?

A That is right.

Q You go on to state on the second page of that letter:

"Joe Byrnes advises me that you have a list of names of customers to whom refunds were denied. Please do not file this list under any circumstances, as it will give Mr. McBride all too much ammunition. I think the enclosed lists will be helpful to you in order to obtain the desired result.

"This is extremely important to us and we cannot impress too strongly on you the necessity of expedition in this matter."

Were you aware, sir, when you sent that list of refunds to Mr. McDonald, sir, to use with the Real Estate Commission that out of the \$33,000.00 on the list of refunds made only about \$2,000.00 was

1 made after the publicity in '62 and the other \$31,000.00
2 was made before the publicity?

3 A No, I wasn't aware of that.

4 Q Who compiled that list for you?

5 A It came to me through the office. I don't
6 know who prepared it in the office.

7 Q Why was it you didn't want the Real Estate
8 Commission to get hold of a list of people that were
9 denied the refunds?

10 A I didn't want to have to defend too many more
11 lawsuits; the habit of stirring things up, you know.

12 Q By the way, Mr. Ross, when you were handling
13 these refunds matters, as distinct from whatever else
14 you have done for the Company, sir, who was the man at
15 the Company who set the policy, so far as you observed,
16 on refunds?

17 A John Carey was in charge of the office,
18 followed by Stan Weiss.

19 I don't think they really set the policy.
20 I think I was permitted a pretty independent hand in
21 working these things out.

22 MR. NISSEN: Your Honor, I have a Grand
23 Jury transcript and I ask that page 14 be released for
24 the purposes of asking the witness if he made a state-
25 ment contained thereon.

1 THE COURT: Yes, it may be released.

2 BY MR. NISSEN:

3 Q Mr. Ross, I call your attention to page
4 14. You read any of it you want. If you think the
5 context isn't there and you want to go back and read, I
6 am sure the Court will release it.

7 It is starting with line 4. Would you read
8 the question and answer and tell me if you made that answer
9 with respect to that question.

0 A (Witness complies.)

1 Yes, I made that answer.

2 Q The question is:

3 "When you say the Company you are re-
4 ferring to what persons in the Company as
5 having charge of the-refund policies at that
6 time, Mr. Byrnes?

7 "A Mr. Byrnes was the man who was
8 on that."

9 Is that true, sir, Mr. Byrnes set the refund
0 policies?

1 A Well, let's see what the time was.

2 Mr. Byrnes was in the office after Rockel
3 left. My correspondence basically was with Messrs.
4 Carey and Weiss.

5 Q Your testimony here doesn't indicate a date.

1 Now, what he did with them and so forth
2 and how he used them, why, you can go into that if you
3 want.

4 BY MR. HUNT:

5 Q Were copies of these questionnaires submitted
6 to the defendants for their inspection and their informa-
7 tion?

8 A I would say to one of the defendants, at any
9 rate. I think Mr. Reisman saw these. I think Mr. Benaron
10 was advised of the --

11 MR. NISSEN: That is completely hearsay,
12 then. He thinks he was advised.

13 THE COURT: It isn't if he knows.

14 MR. NISSEN: If Mr. Benaron says he saw them,
15 that would be something else.

16 THE COURT: When you say you think he was
17 advised, Mr. Ross, on what do you base that?

18 Do you know Mr. Benaron was advised?

19 THE WITNESS: Yes, I think I had a conversation
20 with Mr. Benaron in which I told him that these question-
21 naires came in.

22 As a matter of fact, I think that he physically
23 saw these because he was present in the office of the Real
24 Estate Division the day these were handed to Mr. Poppe;
25 either these or copies of them.

1 to the individual persons requesting same, is that correct?

2 A I don't think so. I am not going to be too
3 definite on that.

4 Basically, I set the policy that I was going
5 to get the best settlement I could make and if I would
6 pick up the telephone to talk to someone at Gamble Ranch
7 offices I didn't particularly decide whether it was Carey
8 or Stan Weiss or Joe Byrnes were there, that I would talk
9 to them.

10 I don't want to go beyond my memory. But
11 so far as Mr. Byrnes having anything to do with these
12 refund letters, he didn't have anything to do with them.
13 He may have been the source of some specific information
14 in the office I wanted.

15 Q In other words, if you are to get a contract
16 and you called and no one else was around and Mr. Byrnes
17 was there, you talked to Mr. Byrnes, and he would accom-
18 modate you and send you the file or whatever it was?

19 A There might have been files other than the
20 files of these matters I would ask him to send me.

21 Q With regard to the specific refunds, and
22 the way you wrote letters and the way you dealt with
23 it and what you said, that was your independent decision?

24 A That is right, I handled those.

25 Q When Mr. Nissen asked whether Mr. Byrnes

1 to the individual persons requesting same, is that correct?

2 A I don't think so. I am not going to be too
3 definite on that.

4 Basically, I set the policy that I was going
5 to get the best settlement I could make and if I would
6 pick up the telephone to talk to someone at Gamble Ranch
7 offices I didn't particularly decide whether it was Carey
8 or Stan Weiss or Joe Byrnes were there, that I would talk
9 to them.

10 I don't want to go beyond my memory. But
11 so far as Mr. Byrnes having anything to do with these
12 refund letters, he didn't have anything to do with them.
13 He may have been the source of some specific information
14 in the office I wanted.

15 Q In other words, if you are to get a contract
16 and you called and no one else was around and Mr. Byrnes
17 was there, you talked to Mr. Byrnes, and he would accom-
18 modate you and send you the file or whatever it was?

19 A There might have been files other than the
20 files of these matters I would ask him to send me.

21 Q With regard to the specific refunds, and
22 the way you wrote letters and the way you dealt with
23 it and what you said, that was your independent decision?

24 A That is right, I handled those.

25 Q When Mr. Nissen asked whether Mr. Byrnes

objected to any of these letters, he would have had no

knowledge of the letters prior to the time that they went out?

A That is true. Whether he looked at the copies that were sent, as a matter of routine at the Gamble office, I don't know.

Q But they were not sent specifically to him?

A No.

Q They were just sent to Gamble Ranch?

A Yes.

Q I assume the same would be true with respect to Mr. Reisman.

Would that be a fair statement, that Mr. Reisman did not interfere with or have anything to do with your handling of the refund letters, and that was you independent --

A That is correct.

MR. WILLENS: Nothing further.

THE COURT: Is that all?

MR. NISSEN: No.

RECROSS EXAMINATION

BY MR. NISSEN:

Q With respect to those refund letters that you didn't send carbon copies to Mr. Benaron, Byrnes or

1 Reisman, sir, you did know Mr. Benaron, whatever his
2 title, that he was boss at Gamble Ranch?

3 A I would say he was the big money man out
4 there.

5 Q And you knew he could look at the files over
6 there and find your letters any time he wanted to, don't
7 you?

8 A Of course, he could.

9 Q And so could the others?

0 A That is right.

1 Q And you --

2 A Mr. Reisman didn't have to go that far.

3 Q He is right next door to you?

4 A That is right.

5 Q And he could come to your door into your
6 office and find the letters?

7 A That is right.

8 Q You say you got information from Mr. Byrnes
9 from time to time on specifics that went into those letters,
0 and you have already mentioned some things about the wells
1 and other things, agriculture, and that type of thing that
2 he told you, right?

3 A Yes, -- well, I got that information for
4 other reasons than these letters. I actually called for
5 and got the files of the Gamble Company in connection with

ROBERT L. McDONALD

right.

-2059-A is objected to.

THE COURT: -2059-A is an attachment to --

MR. ROTHMAN: -2059.

THE COURT: You are now objecting to -2059?

MR. ROTHMAN: Yes. I saw the name Wyman up there. I thought that was a different Wyman.

I am objecting to -2059 and -2059-A.

-2060 is objected to. -2061 is not. -2062 is objected to, -2063 is objected to, -2064 is objected to, -2065 is not, -2066 is not, -2067 is not. -2068 is not and -2069 is not.

THE COURT: All right.

Can you go ahead now, Mr. Nissen?

MR. NISSEN: I think we can.

Q But for the purpose of the Court's ruling on those objections, I ask you, Mr. McDonald, what was your practice when you would receive a request for a refund or a complaint from a purchaser or purchaser's attorney?

A I would forward the letter to the office of Pacific Land -- Gamble Ranch office in Los Angeles.

MR. NISSEN: I don't want to go through the ones that aren't objected to, your Honor.

Can I just offer those?

THE COURT: Yes, but I want to find out a little

more about these.

You forwarded it to Gamble Ranch in Los Angeles, but then did you get information upon which you based the reply?

I notice some copies of replies.

THE WITNESS: There is only one, your Honor.

Do you want me to explain this?

THE COURT: You say there is only one, you mean there is only one letter you wrote?

THE WITNESS: I dealt with one refund in connection with a Nevada attorney. The rest of them I forwarded merely the letter to the Los Angeles office.

THE COURT: You didn't make any reply?

THE WITNESS: That is correct.

THE COURT: You would reply to the extent that you did say you had forwarded the letter to the Los Angeles office?

THE WITNESS: That is correct.

THE COURT: All right.

Now go ahead, Mr. Nissen.

BY MR. NISSEN:

Q One transaction you refer to, sir, as having handled with the Nevada attorney is the Puckett transaction?

A That is correct.

THE COURT: Did you handle that at the request

1 by the address?

2 A Yes.

3 MR. NISSEN: We offer that as Government's --

4 THE COURT: This is what letter, now?

5 MR. NISSEN: -B.

6 THE COURT: Ordered in evidence.

7 (Letter marked Plaintiff's
8 Exhibit 2-1266-B was re-
9 ceived in evidence.)

10 BY MR. NISSEN:

11 Q I note Mr. Ross commences:

12 "Dear Bob:

13 "I had a go-around with our Real Estate
14 Commissioner today and he wants a definite
15 statement from you as to what you told the
16 Nevada Real Estate Commission in connection
17 with refunds. All that he knows is what he
18 read in the newspapers and trouble multiplies.

19 "Will you please write a letter to W. A.
20 Savage, Real Estate Commissioner" et cetera.

21 "Please send the letter to this office for
22 transmittal to the Commissioner. In the
23 letter please state what you told the Nevada
24 Real Estate Commission when you addressed them
25 on behalf of our client. I told the Commissioner
that you stated that the Company was ready, willing

and able to make a refund to any purchaser who had purchased any land from our Company based upon false or fraudulent misrepresentations. I think this is what you told the Commissioner, but the newspapers indicated that we were willing to make refunds to anybody who wanted a refund.

"If you will send me a letter consistent with the truth and consistent with the views that I have expressed herein, it will be very helpful to the solution of some of our new problems.

"Sincerely yours,"

and then the signature.

I have, Mr. McDonald, Government's 3-2032, a letter of September 26, 1961, and I ask you, sir, is that the letter that you read into the Minutes of the Nevada Real Estate Commission on January 8, 1962?

A Yes.

THE COURT: What was the exhibit number again?

MR. NISSEN: 3-2032. It is one that we have previously offered.

THE COURT: Yes, I know.

BY MR. NISSEN:

Q Mr. McDonald, I want you, please, to look at

who feel they have been treated unfairly"?

A That is correct.

MR. NISSEN: The next letter I have, your Honor,
that we would mark -C, a two-page letter of March 26, 1962,
to Mr. McDonald from Mr. Bertram H. Ross for Samuel Reisman.

THE COURT: All right. -C is ordered in evidence.

(Letter marked Plaintiff's
Exhibit 2-1266-C was re-
ceived in evidence.)

BY MR. NISSEN:

Q I notice it is dated March 26, 1962 and it starts
out:

"I am enclosing herewith a list of refunds
made by Pacific Westates up^{to} and including March
21, 1962.

"This list is sent to you in duplicate
and you will note that the total contract prices
on the refund items exceed \$545,000 and the
actual cash refunds exceed \$33,000.

"I am likewise enclosing herewith in
duplicate a list of applications for refund
which are in process at the present time.

"I think the Nevada Real Estate Commission
will realize we have done a substantial job and
that any statements to the contrary are negatived
by the enclosed documents.

"I am enclosing in duplicate some material concerning the clothing factory that is being installed at Montello, Nevada. It appears that this factory is now a reality and the Commission will undoubtedly be interested in the enclosed material."

Then there is the request for you to take the matter up with the Commission as soon as possible.

On the next page in the first paragraph it says:

"Joe Byrnes advises me that you have a list of names of customers to whom refunds were denied. Please do not file this list under ^{any} circumstances, as it will give Mr. McBride all too much ammunition. I think the enclosed list will be helpful to you in order to obtain the desired results.

"This is extremely important to us and we cannot impress too strongly on you the necessity of expedition in this matter.

"Sincerely yours,

"Bertram H. Ross."

MR. NISSEN: And we have, your Honor, a letter of February 14, 1962, from Mr. McDonald to Mr. Byrnes and I would mark that -D, I believe.

THE COURT: -D is ordered in evidence.

JOHN W. CAREY

0251
1 were your duties at that time, sir?

2 A Well, it was primarily administrative.

3 At that time -- at the time I was brought over
4 it was somewhat as a replacement for Mr. Rockel, except
5 that when I was brought over Stanley Weiss was placed
6 in charge of the physical operation of the Ranch and the
7 visitations of the customers to the Ranch, and so on.

8 Then I was to handle the administrative and
9 of the Company.

0 Q All right.

1 In the course of that did you have occasion
2 to handle or process refund claims?

3 A Yes, I did.

4 Q Would you tell us to what extent you handled
5 that and what steps were followed in the processing of those
6 claims?

7 A Well, originally, when I first came there,
8 there were a number of refund claims that had been already
9 filed with the Company and there was a file of those re-
10 fund claims.

11 Then some of them were not -- the processing
12 was not completed on some of them, so that if a settlement
13 couldn't be made with the customer and they simply insisted
14 on a refund, then I turned over the file to Mr. Finell,
15 an attorney, for his advice as to what to do.

1 Q On whose instructions did you turn those over
2 to Mr. Finell?

3 A Mr. Byrnes.

4 Q At this time was Mr. Byrnes still officed at
5 the Company?

6 A Yes.

7 Q Was he there throughout the time you were
8 there, sir?

9 A Yes.

0 Q All right.

1 You mentioned turning these requests over to
2 Mr. Finell.

3 Sir, at the time you were doing this were
4 you familiar with the financial condition of the Company?

5 A Yes.

6 Q And did the Company have the money to refund
7 to the purchasers who were demanding refunds?

8 A Some refunds could have been made up until the
9 cease and desist order was signed. But after that the
0 Company's financial situation wasn't good enough to allow
1 cash refunds.

2 Q And before that was the situation good enough
3 to permit all the refunds to be made?

4 A No.

5 Q Now, procedurally, sir, did you have anything

1 to do with the questionnaire that was submitted to
2 customers who were claiming refunds?

3 A No, that had been designed and mimeographed
4 before I came with the Company.

5 Q Now, did there come a time, sir, when Mr.
6 Finell no longer passed on the refunds while you were
7 there?

8 A Yes. Mr. Bert Ross was substituted for Mr.
9 Finell.

10 Q And on whose instructions?

11 A I am not sure who told me, but he might have
12 told me himself.

13 Q Did you make the decision or did somebody above
14 you?

15 A Someone above me made it.

16 Q Who were your superiors at that time?

17 A Mr. Byrnes and Mr. Benaron.

18 Q Now, when Mr. Ross took over the handling of the
19 refund claims, was there any discussion, sir, about an
20 approach that could be used to possibly reach a settlement
21 with some of these complaining people?

22 A At one point -- and I can't remember exactly
23 what date -- Mr. Benaron suggested that since the Company
24 didn't have enough cash to make these refunds that we
25 should settle the claims by giving the customers paid up

1 land for the amount of cash that they had paid into their
2 contract.

3 For example, if they had paid 25 per cent of
4 the purchase price of a 40-acre parcel, we would give
5 them a 10-acre parcel free and clear and cancel the con-
6 tract.

7 Q When these matters were referred to Mr. Ross,
8 can you tell us just as a matter of office routine how
9 that was done?

10 Did you physically send the complaint letter?

11 How did you go about referring it to Mr. Ross?

12 Q If it came in by letter, the letter was sent
13 down to Mr. Ross the same day.

14 We prepared a refund control sheet to keep in
15 our own office and started a refund file in our own office.

16 Q And when Mr. Ross, if he did, sent out a reply,
17 did the Company receive a copy for its file?

18 A Yes.

19 Q On that customer?

20 A Yes.

21 Q And were these files, sir, available in the
22 office for Mr. Byrnes or whoever else was there?

23 A Yes.

24 Q Now, sir, did you ever deny any refund claims
25 on your own? Finally denied them without anybody

1 else's say so?

2 A No.

3 Q Do you recall if you ever had a conversation
4 with Mr. Byrnes regarding a newspaper clipping about the
5 Nevada Real Estate Commission?

6 A Yes, I do. I believe it was in January of
7 1962 when I was still in Pasadena at Grace and McCann.

8 I happened to go over to Gamble Ranch from
9 Wilshire Boulevard for some reason and Mr. Byrnes had
0 shown me the article that was in the paper, I believe,
1 the day before or the week before and asked for my opinion
2 about it.

3 Q What conversation occurred then?

4 A Well, after I read it I -- the article basically
5 said that anybody that wanted a refund could have a refund.

6 So I said, "That is great. This shows this
7 ^{the} kind of company the public would like to do business
8 with."

9 Q Did Mr. Byrnes say anything about the article?

0 A He said that wasn't the answer he wanted.

1 Q In addition to handling the refund claims,
2 sir, did you have any responsibilities with respect to
3 budgeting the Company's money during the time you were
4 there?

5 A Yes, I did.

1 and good.

2 MR. ROTHMAN: The Government introduced 2-186
3 into evidence.

4 Since it was written by firm I decided not to
5 ask for the original.

6 Q At any rate, in it you said under Sub-paragraph
7 (d):

8 "Under the direction of independent
9 counsel has required that the advertising
0 agency for the Company to submit all bro-
1 chures to a Deputy in the Office of the
2 Real Estate Commission."

3 A I would have been told that had been done.

4 Q Now, these varying complaints which have been
5 read into the record by Mr. Nissen, and in part by some
6 of the attorneys for the defense here, as it relates to
7 your activity, of course, with all complaints that came
8 to you after this January 1962 incident, is that correct?

9 A Yes.

0 Q So far as you were aware, when this January
1 '62 article came into existence, and you thereafter came
2 to the Company, the Company policy, so far as you were
3 concerned, was to turn the complaints over to legal counsel,
4 isn't that correct?

5 A I wasn't listening closely enough.

Could you say that again?

Q Yes.

As I understood your testimony -- you correct me if I am wrong -- when this flood on the bank came, that is, the complaints following the January '62 article, the program, insofar as the handling of these complaints was concerned, was to refer them to legal counsel, isn't that correct?

A Yes, that is correct.

Q And these were the instructions that were given to you by whom?

A By Mr. Byrnes.

Q So what you did at the Gamble was that you processed the claim into these folders that you talked about and then off they went for review by the attorney, is that correct?

A Yes.

Q And early in the situation the attorney who did it was Mr. Finell and later it became Mr. Ross, is that correct?

A Yes.

Q I take it that you were aware of the fact that these gentlemen were charged with the responsibility by management of sifting through these complaints and making the disposition on them that in their legal judgment they

GERALD L. WELLER

Mr. Byrnes.

Q All right, sir.

In your work of taking care of collections, -- delinquent accounts, did you say, sir?

A Yes.

Q In that work, sir, from time to time did you send out letters to the various customers that were delinquent?

A Yes, I would.

Q Were the letters that you sent out, sir, ones that you authored without consulting anyone, or were they ones that had been discussed with someone?

A The concept or the stock was given to me and then I would broaden that point.

That is, I never came up with a policy of my own accord or did I ever come up with the procedure to be followed, but this would be given to me and then I would broaden it in my own way.

Q Who would give you the policy to be followed?

A It usually would be -- in all cases it would be cleared usually with Mr. Benaron, Mr. Byrnes, and usually Mr. Reisman.

Q Did you ever have occasion to send them copies, the carbon copies of your material?

A Always of the -- at least not of the first

one, at least the first few of any final draft or
any final thought that I had of the pattern that I followed.

Q Did you ever send out anything that had not
been checked and cleared by them in that fashion?

A Never.

MR. NISSEN: Your Honor, we have a group of
Gamble Ranch Company files -- papers, rather, and they
are not in a file.

They are marked 3-1 to 3-100.

These we offer, dealing with collections of
accounts.

MR. HUNT: 3-1 to 3-100?

MR. NISSEN: Yes.

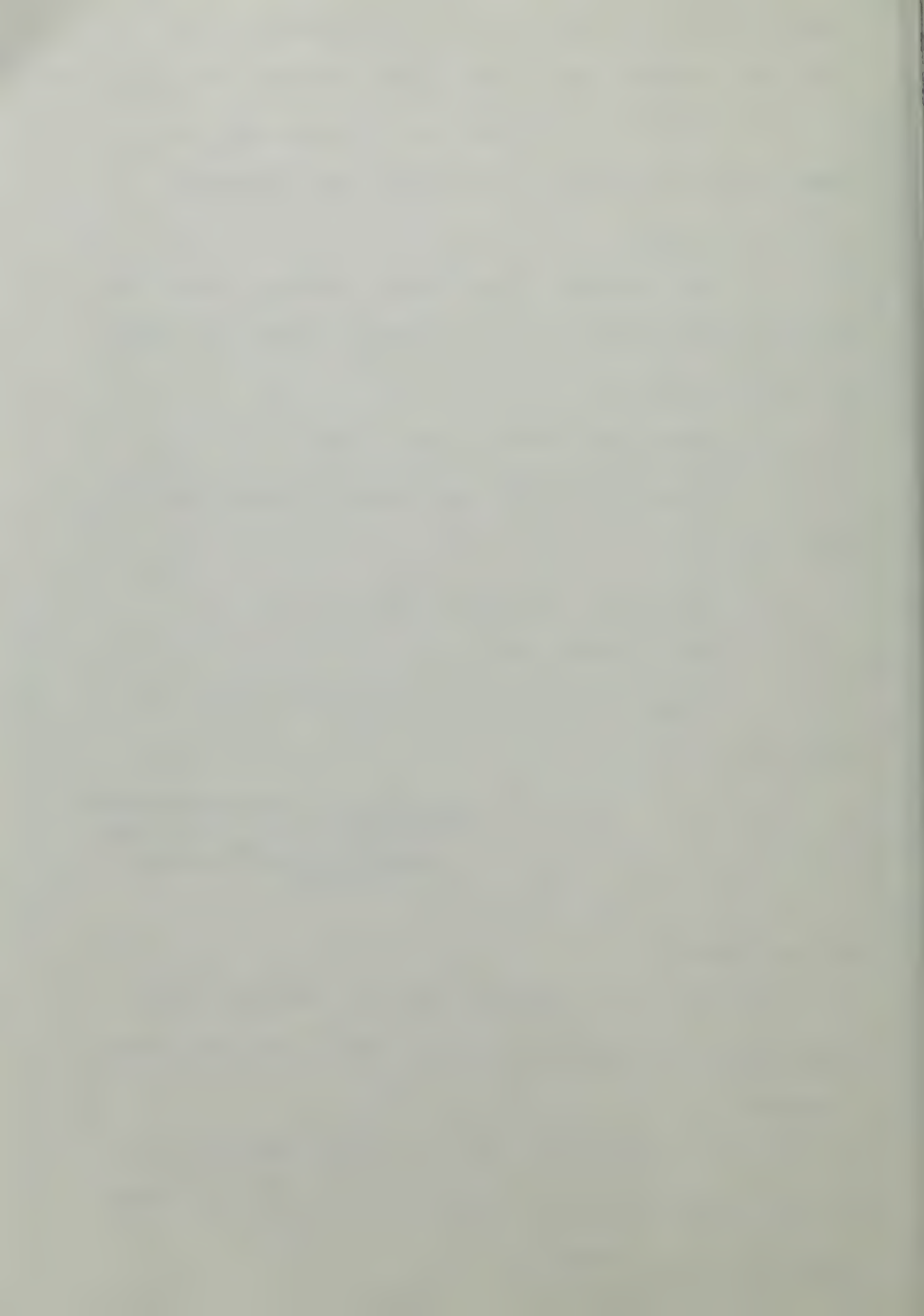
THE COURT: 3-1 to 3-100 are ordered in
evidence.

(Documents marked Plaintiff's
Exhibits 3-1 to 3-100, both
inclusive, were received
in evidence.)

BY MR. NISSEN:

Q We won't take the time, Mr. Weller, to go
through all of them at this time, but we may pick some
examples.

I notice here in 3-1, a green memo from you
to Mr. Byrnes, and attached to it apparently is a mimeo-
graphed type of letter.



MR. NISSEN: Yes, sir.

THE COURT: All right. Ordered in evidence.

(File marked Plaintiff's
Exhibit 3-1608 was re-
ceived in evidence.)

BY MR. NISSEN:

Q I notice a letter of April 2, 1962, Mr.

Weller, over your name as the Manager of Special Collec-
tions, to a customer named Shultz.

Now, we are interested hereonly in the second
paragraph and that says:

"With regard your request for cancella-
tion and refund of moneys paid in, this is to
advise that this is not possible. The recent
news item pertaining to refund due to customer
dissatisfaction requires an explanation that
this is the case, and has always been, in the
event of a customer factually proving that
our project was not what they were led to
believe. You state, this is not the case as
far as you are concerned."

Now, Mr. Weller, would you tell us, please,
if this is merely your statement of the Company's policy
on refunds or if you checked with anybody before you stated
that, sir?

A I checked.

Q Would you tell us with whom you checked?

A I can't remember with whom I checked on this specific instance.

But this thought was as a result of a meeting after the adverse publicity first broke and how we would -- those of us who were on the staff would carry requests or demands, or whatever the case might be, from disgruntled buyers.

THE COURT: Who was at that meeting that decided that?

THE WITNESS: I can't remember exactly who it was, over and above --

I remember the meeting taking place and the office in which it took place, and Mr. Byrnes, Benaron and Reisman.

I think Mr. Rockel was the office manager at the time, and whoever the sales manager was at the time.

THE COURT: All right.

MR. NISSEN: We offer these further documents, your Honor: 3-275.

THE COURT: 3-275?

MR. NISSEN: Yes, sir.

THE COURT: Gamble Ranch file?

MR. NISSEN: A form letter from the Gamble file.

THE COURT: Ordered in evidence.

MARIA M. MANZIN

THE COURT: Yes.

(The record was read.)

MR. HUNT: Thank you.

I will clear it up on cross examination.

THE COURT: All right.

MR. NISSEN: The document Mr. Hunt looked at, of course, has Mr. Bert Ross' name on it.

This was before this witness was doing the Gazette, as I understand it.

Q Mrs. Manzin, from time to time at Gamble were you ever called upon to send out letters to customers who had requested refunds?

A Yes, toward the end.

Q Would you tell us, please who would come to you with that particular task, in the ordinary course of your work?

A Well, the letter would -- sometimes the letter would come into the office, requesting a refund and then I would either go to Mr. Rockel or Mr. Byrnes, to see if refunds could be made on this particular one.

They would tell me yes or no, whatever it was to be.

Q They would tell you what to do with the request?

A Yes.

Q I see.

THE COURT: What is this last one, 3- --

MR. NISSEN: 3-862.

THE COURT: This is a Gamble Ranch file and you will use it with this witness?

MR. NISSEN: Yes, sir.

THE COURT: 3-862 is ordered in evidence.

(File marked Plaintiff's Exhibit 3-862 was received in evidence.)

BY MR. NISSEN:

Q I notice in the file, Mrs. Manzin, a letter date stamped September 8, 1961, which happens to be addressed or headed, "Mr. Arnold Clejan" and it says:

"I inspected the property you sold me at the Gamble Ranch and it was misrepresented. There is no water."

Now, some of the words are underlined in red, apparently, by Gamble Ranch rather than by the writer, would that be so?

A Yes.

Q "The land is not surveyed as you stated. There is no access road to said property and many other facts that make this property useless. Therefore we would like our deposit returned immediately."

Now, thereafter, I notice in the file a letter

of September 29, 1961, over your name, to the Dowlers.

Did you consult with anyone before you wrote that letter, about whether a refund would be made?

A Yes, I would have consulted with Mr. Rockel or Mr. Byrnes, to see what to reply to the customer's complaint.

Q I see.

Did you reply as you were instructed, substantially?

A Yes.

Q I notice your letter says:

"We are also deeply hurt that you feel Gamble Ranch was misrepresented to you, for we have never, at any time, to our knowledge, made misrepresentations regarding our property.

"However, the policy of our organization is satisfied customers and we are therefore, terminating your agreement."

My question to you is, on this statement of the "policy of our organization", at this time, to your knowledge, was it the policy of Gamble Ranch to refund money to customers who were not satisfied?

A As far as I knew, yes.

Q And who told you that that was the policy?

A Mr. Byrnes.

Q In fact, in this situation, your letter of October 19, 1951, --

A It should be 1961.

Q Yes, '61. It does, in fact, send a refund check.

A In the amount shown.

Q In the amount of \$90.00, which was for a full refund of all money paid?

A Yes.

MR. NISSEN: We offer, your Honor, 3-2101, a letter of February 26, 1962 from Mrs. Manzin to Miss Jane Cody.

THE COURT: 3-2101 is ordered in evidence.

(Document marked Plaintiff's Exhibit 3-2101 was received in evidence.)

BY MR. NISSEN:

Q I notice here, Mrs. Manzin, your letter says:

"Receipt is acknowledged of your letter regarding our recent publicity."

Was that recent publicity unfavorable publicity in the paper?

A Yes.

Q And it says further:

"There is a very simple explanation to it, and your sales representative, Mr. Stanley

Weiss, who is now our Sales Manager, will contact you to explain it to you."

Would you tell us, please, if anyone instructed you to give such a letter and, if you know, what the very simple explanation was?

A That particular one, Mr. Byrnes told me there was a simple explanation and told me to have them contact Mr. Weiss, so he could explain it to them.

Q Did Mr. Byrnes tell you what the simple explanation was at that time?

A No, he didn't.

I presumed it was that some customers buy and then they don't want to carry on their contract, you know, and that is why the publicity was there.

MR. NISSEN: We offer, your Honor, 3-2083 from the Gamble Ranch files.

THECOURT: 3-2803 is ordered in evidence.

(Letter marked Plaintiff's Exhibit 3-2083 was received in evidence.)

MR. NISSEN: Without reading the entire document, it says:

"Here's an opportunity to get a lot of BLUE CHIP STAMPS with little or no effort!"

Then it tells how to get Blue Chip stamps by giving the names of customers.

NORMAN T. ROCKEL

THE WITNESS: January 1962.

THE COURT: All right.

THE WITNESS: I feel foolish for that.

THE COURT: It is quite all right. It is quite understandable to get years mixed up, unless you stop to think about it.

THE WITNESS: In the latter part of January there was a news release in three media, TV, radio and also in the newspaper, concerning an announcement that the Gamble Ranch Company would give anyone, in effect, their money back who wished it.

I went into the office that morning and I think it would be reasonable to say the sales people came in kind of early that morning, also.

As soon as Mr. Byrnes came in we asked him what the situation was, particularly Bob Stein and myself.

He said that the news release was not consistent with what had been stated in Nevada, and that the Company would continue to -- in other words, what it should have been was that the Company would continue to follow and pursue their policy that it had previously followed.

That wherever there was any sales misrepresentations found on the part of a salesman, that monies would be refunded to the customer.

1 He also stated, and I would say this would
2 possibly have been about an hour or a half an hour later
3 -- possibly half an hour to an hour later -- that the
4 firm of Wyman, Finell & Rothman would be brought into
5 this matter to handle these requests.

6 Later that morning I was called to Mr. Byrnes'
7 office and was introduced to Mr. Finell, a partner of the
8 firm of Wyman, Finell & Rothman, and told that Mr. Finell
9 would handle all refund matters as a result of this pub-
0 licity that had taken place.

1 Following that, Mr. Finell prepared a question-
2 naire form that, in turn, we reproduced on our own equip-
3 ment there, which was given to each purchaser making a
4 request for refund.

5 These forms, after they were completed by the
6 purchaser, and if the purchasers happened to come into
7 the building they were told, asked to complete it or
8 the forms were mailed to them, and they were returned.

9 The purchasers were told that this would be
0 taken up with our attorneys. And these forms then, in
1 turn, along with the customer's file was taken to Mr.
2 Finell.

3 I remember taking, I think, about two trips
4 and this was an accumulation. I didn't run down every
5 minute of the day.

1 Mr. Finell would go over these forms and
2 determine as to whether refunds were to be made or not.

3 Once he had made the determination, we then,
4 in turn, from the offices of the Company, sent out a
5 form letter to the customer advising him that they were
6 denied their refunds, or in the event refunds were made,
7 why, the money was paid to the customer along with a
8 covering letter.

9 BY MR. NISSEN:

10 Q Now, you mentioned Mr. Byrnes stating, I
11 believe you said, that the policy that had been in ef-
12 fect would continue.

13 A That is correct.

14 Q Upon a showing of misrepresentation the people
15 could get their money back?

16 A That is correct.

17 Q While you were there, sir, what kind of showing
18 was required?

19 In other words, if the purchasers claimed a
20 certain representation was made, what kind of -- did
21 you have a standard proof there, or what did you rely
22 on?

23 A No, --

24 MR. ROTHMAN: I think that question should
25 be directed to Mr. Finell and not to this witness.

THE COURT: He can say what was done. He said they sent out a questionnaire.

I don't know what the questionnaire was or what it asked.

MR. NISSEN: I was not trying to get ahead of Mr. Byrnes' statement.

Q In other words, did he tell you how the purchaser would have to establish the claim of misrepresentation?

A No, --

THE COURT: You mean did Mr. Byrnes tell him that?

MR. NISSEN: Yes, sir.

THE COURT: All right.

THE WITNESS: I would like to clarify the question.

Are you asking me prior to the direction?

THE COURT: What direction?

THE WITNESS: I am talking about the direction I had to take all of these to Mr. Finell.

Are you talking about prior to that point?

BY MR. NISSEN:

Q My question is -- let me tell you exactly what I am talking about.

At the time Mr. Byrnes was talking to you, and

when he said, in effect, "Our policy will continue as it has been in the past", did he tell you what a purchaser would have to do to establish that misrepresentation had occurred?

A No, this was determined, insofar as I was concerned, by the form that Mr. Finell prepared and then Mr. Finell's review of these particular forms.

Q Maybe I can get at it this way: Mr. Byrnes said that the policy was going to continue the same as it had been in the past, sir?

A Yes, I am sorry. Now you are talking actually about before.

What was the policy before this date, is that correct?

Q At that minute and before.

A The policy was such that if we had a customer come in we talked to the customer, I personally talked to the customer.

And there was an adjudication, which again was a matter of opinion with respect to all the facts, and in the event we found there had been misrepresentations --

THE COURT: Who is "we"?

THE WITNESS: I say "we". I say myself and I could discuss this with the sales manager at times and

even the sales people that were involved, and I would also discuss it with Mr. Benaron.

Mr. Reisman was very adamant with respect to the situation of handling this in a very clean-cut manner, and I would discuss these things with Mr. Reisman.

I also discussed them with Mr. Benaron.

THE COURT: Have you answered the question?

THE WITNESS: I hope I have.

THE COURT: All right.

BY MR. NISSEN:

Q In summary, you would talk to the sales person to find out what their story was?

A That is correct, along with the customer.

Q And you would decide --

A I think it would be fair to say that I would make an initial determination, and realizing that I was, in effect, spending money of the Company, as a matter of automatic policy I took it up with the principals. I referred it and told them what my recommendations were.

Q All right, sir.

MR. NISSEN: We have here a file marked 3-307, which is a Gamble Ranch refund request file, your Honor, and we will offer it at this time so I might ask him a question about it.

THE COURT: 3-307 is ordered in evidence.

(File marked Plaintiff's
Exhibit 3-307 was re-
ceived in evidence.)

BY MR. NISSEN:

Q Without going through the entire file,
Mr. Rockel, there is a small note from Bob Finn to Norm
Rockel with the received stamp of February 5, 1962 on
it, and Mr. Finn says in part to you;

"Here's another of the Jaffee pattern.

"He promised this man a job if he bought.

The man was ready to sell his house, and move
up to the Ranch with all his heavy duty con-
struction equipment, which totaled about
\$100,000. He was also planning to build
a home on his property.

"The job he mentioned, as promised by
Jaffee, was road construction. He said,
that Jaffee never got back to him on any
of the promises he made.

"This guy turned real sour on Gamble
Ranch. It wasn't misrepresentation on the
part of Gamble Ranch, but misrepresentation
on the part of Jaffee."

I call your attention to the first line there,

"Here's another of the Jaffee pattern."

While you were there, sir, did you notice any pattern on the part of Mr. Jaffee that indicated he sometimes went --

A Yes, I would say that Jaffee as a salesman in situations like this caused problems, so there was a pattern.

Q And had you, sir, questioned Mr. Jaffee from time to time about complaints from customers?

A Yes.

Q And did Mr. Jaffee admit or deny to you he made such misrepresentations?

A Jaffee as an individual was a rather peculiar person. He could open his mouth up, in effect, with respect to these things and say nothing.

As a result of it, after I went through an exposure like this I really didn't what I consider tackle him any more on these matters.

In other words, I considered that Jaffee tended to double talk himself around a situation like this.

Q All right. But in your customary policy you did interview him or question him when a complaint arose?

A Yes.

Q You would also question the purchaser?

A Yes.

1 Q Contact them.

2 Did you recommend or whatever you said you
3 did, pass this on to the principals, Mr. Benaron, Mr.
4 Byrnes, Mr. Reisman from time to time?

5 A Yes.

6 MR. ROTHMAN: Pass what on?

7 MR. NISSEN: The fact that Mr. Jaffee said one
8 thing and the customer said another.

9 THE WITNESS: Let me again try to make a point
0 which I haven't made very clear.

1 I would take and confront Jaffee with a par-
2 ticular situation that a customer made, but as far as
3 I was concerned -- this is a matter of my own personal
4 opinion, that is true, -- but I thought that Jaffee would
5 tend to avoid ²direct answer to my question.

6 Therefore, I could not, in the way, at least,
7 that I feel with people I could not understand what really
8 happened from him.

9 THE COURT: Did you take it up with anyone
0 else, with Mr. Benaron or anybody?

1 THE WITNESS: Yes, I would communicate the
2 facts of the situation onto the principals.

3 THE COURT: All right.

4 BY MR. NISSEN:

5 Q After this newspaper article and after Mr.

is merely some sales material you are passing on, isn't that correct?

A In our progressive review of our sales literature, yes.

Q This is the discontinuance of the Nevada Ranch Service letter?

A Yes, that is the discontinuance.

Q Let's go on, if we may. I am now in October of 1961, and I want to stop on this letter for a little while, if I may.

October 9, 1961, 1-543. Here is some correspondence between you and Mr. Reisman dealing with some complaints, is that correct?

A I haven't seen this letter.

Q I am sure you haven't. The letter says:

"Please be advised that I have just received three letters or notices of complaints with respect to Gamble Ranch Development Corporation Sales".

A That is correct.

Q Mr. Reisman is advising you that he, Mr. Reisman, has received three complaints from customers, is that correct?

A That is correct.

Q You will note this letter is a letter that was

written before the procedure was set up with Mr. Finell, as it related to the handling of cusomter complaints?

A That is right, that was before.

Q I take it that before that program was set up with Mr. Finell in 1962, any customer complaints that may have come to the attention of Gamble were handled through Mr. Reisman's office?

A No, that is not correct.

Q You correct me then.

A Complaints were handled -- and I testified earlier to this -- some complaints were handled with Reisman's office.

I personally, along with questioning the sales people and communicating with the customer, either through a meeting with the customer or by correspondence, adjudicated certain of the complaints and made decisions and then, in turn, that is based on the -- what I called initial decision that I made.

I passed it then along to the principals of the Company, as to what, in effect, should be finally done.

Q I think that answers it. I am sure it does.

On these complaints of 1-543 that Mr. Reisman sent to you, you reviewed them and made your comments and advised in one case there should be a refund. That

IN THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

UNIFORM OIL COMPANY, a Montana
corporation,

Appellant,

-vs-

PHILLIPS PETROLEUM COMPANY, a
Delaware corporation, W. J. BRIDGES,
DONALD W. CULLEN, CURTICE GARDNER
and JAMES H. NORWOOD,

Appellees.

BRIEF ON APPEAL OF THE INDIVIDUAL APPELLEES,
BRIDGES, CULLEN, GARDNER AND NORWOOD

HENRY LOBLE
GENE A. PICOTTE
833 North Main Street
P. O. Box 176
Helena, Montana 59601

*Attorneys for the Individual
Appellees, Bridges, Cullen,
Gardner and Norwood.*

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I N T H E U N I T E D S T A T E S C O U R T O F
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HENRY LOBLE
GENE A. PICOTTE
833 North Main Street
P. O. Box 176
Helena, Montana 59601

*Attorneys for the Individual
Appellees, Bridges, Cullen,
Gardner and Norwood*

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IN THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

UNIFORM OIL COMPANY, a Montana
corporation,

Appellant,

-vs-

PHILLIPS PETROLEUM COMPANY, a
Delaware corporation, W. J. BRIDGES,
DONALD W. CULLEN, CURTICE GARDNER,
and JAMES H. NORWOOD,

Appellees.

BRIEF ON APPEAL OF THE INDIVIDUAL APPELLEES,
BRIDGES, CULLEN, GARDNER AND NORWOOD

STATEMENT OF THE CASE

The statement of the case contained in appellant's brief is incomplete and misleading, and this statement is intended to supplement and correct appellant's statement.

The amended complaint charges the appellees with *a specific conspiracy*. It alleges that Phillips and the individual appellees "conspired to destroy the business of the plaintiff". (Italics ours). (Para-

graph 13, page 4, lines 8 and 9 of the amended complaint). It is further alleged that it was "*the intent of the defendants.....to destroy the business of the plaintiff.....and thereafter.....to increase the price to a higher predetermined level*". (Italics ours). (Paragraph 14.B., of the amended complaint, pages 4 and 5).

Contrary to what is said at page 6 of appellant's brief, Phillips Petroleum Company had *no* control over the operations of Bridges. (Tr. 121, 122, 152, 153, 154, 155, 164, 165, 166, 167).

Bridges, Cullen, Gardner and Norwood were all independent businessmen, and this is borne out by the whole testimony of Bridges, Gardner and Norwood; and there is not a scintilla of contrary evidence in the record. Bridges, the jobber, owned the gasoline in question from the moment he picked it up at the refinery or pipeline, and sold it either at his own station to the public or to the appellee dealers as his own product. (Tr. 98, 99). Likewise, the appellees, Cullen, Gardner and Norwood, bought the gasoline from Bridges and sold it as their own merchandise to the public and made their own decisions as to prices. (Tr. 122, 123, 126, 128, 129, 159, 160, 165, 166).

There was testimony that lowering of gasoline prices was "discussed" by the appellees. But Bridges, Gardner

and Norwood (Cullen was not called to testify) insisted that there was no agreement or conspiracy between any of the appellees, including Phillips Petroleum Company, and that the station operators set their own prices, after Bridges simply *informed* the others that he was going to lower the prices at his own retail station. (Tr. 122, et seq., 166, 167, 168, 110, 111). All that Bridges did was to *inform* Phillips Petroleum Company and the appellee retail dealers that he was going to lower the price of gasoline in his own retail gasoline station at 1901 North Main Street in Helena; and when he did, the other appellee dealers followed him in the matter of price lowering, as did some of the other retail stations in the city, all for the purpose of meeting competition.

There was no evidence that appellees, or any combination of appellees possessed the *power* to monopolize the market or restrain competition; on the contrary, the evidence was uncontradicted that Phillips was only one of many suppliers, Bridges was only one of many wholesalers, and Bridges, Cullen, Gardner and Norwood were only four of many retailers.

ARGUMENT

Uniform Oil had the burden of proving every material allegation of its amended complaint. The trial court directed the verdict at the close of Uniform's case on

the ground of failure of proof. Summarized, the material allegations of the complaint are (1) violation of the Sherman Act, (2) damages, and (3) causal relation between alleged violation and damages. The claim is grounded solely upon alleged violation of Sections 1 and 2 of the Sherman Antitrust Act, and a particular conspiracy is alleged, to-wit: *Concerted price cutting with specific intent thereby to destroy the business of all independents, thus obtain a monopoly, and thereafter to raise prices back up to "a higher predetermined level."* (pp. 4-5, of amended complaint). Uniform Oil in the trial court had the full burden of proving this alleged violation, *i.e.*, *that particular conspiracy*. No other or lesser proof would suffice. Uniform also had the burden of proving its alleged damages and that such damages were *caused* by the alleged active conspiracy.

In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 289 F. 2d 86 (1961), this court clearly stated the general rule:

"In a treble damage action under 15 U.S.C.A. § 15, it is clear that the plaintiff, in order to make out a claim on which recovery might be had, has the burden of proof to establish the following elements of his case: (1) That the defendant has violated the antitrust

laws; (2) that plaintiff has suffered an injury to his business or properties susceptible of being described with some degree of certainty in terms of money damages; and (3) that a causal connection exists between the defendant's wrongdoing and the plaintiff's loss.

* * * Of course, a failure by the plaintiffs to prove *any one* of the three elements of their case would require the trial judge to direct a verdict for the defendants." (Italics ours).

The courts have laid down specific rules as to the burden of proof of each of these three elements.

1. Burden of proof as to the violation--conspiracy to restrain trade and monopolize.

"Plaintiffs have the burden of establishing that defendants *possess* monopoly power. Monopoly power is the power to control prices or exclude competition. *United States v. E. I. DuPont DeNeMours & Co.*, 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956); *American Tobacco Co. v. United States*, 328 U.S. 781, 66 S. Ct. 1125, 90 L.

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Ed. 1575 (1946); *Standard Oil of New Jersey v. United States*, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911). * * *

"Defendants are not guilty of an attempt to monopolize within the meaning of § 2 of the Sherman Act. In order to prove such an attempt *plaintiffs must show that defendants had a specific intent to destroy competition and build a monopoly. Times Picayune Publishing Co. v. United States*, 345 U.S. 594, 73 S. Ct. 872, 97 L. Ed. 1277 (1953). Plaintiffs must further prove conduct, on the part of defendants, 'which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it.'" (Italics ours). (*Centanni v. T. Smith & Son, Inc.*, 216 F. Supp. 330, 339, D.C. La. (1963), affmd. 323 F. 2d 363).

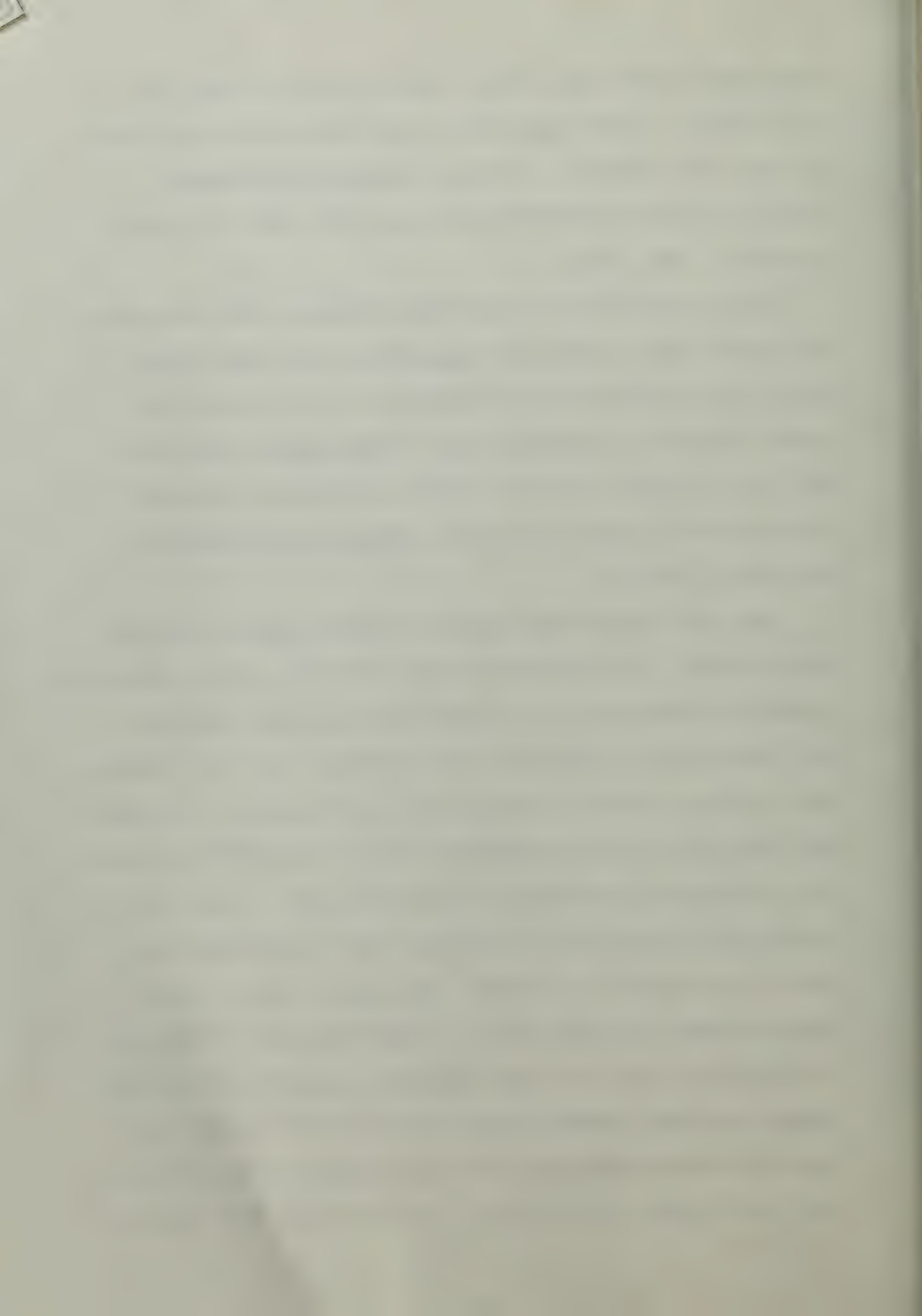
Not a shred of evidence was presented showing possession of monopoly power on the part of appellees, intent to destroy competition and build a monopoly, or ability or possibility of accomplishing monopolization or a dangerous probability of it. On the contrary, the .

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inference to be drawn from the evidence is that no combination of the appellees could possibly have monopolized the market. In fact, Bridges was himself driven out of business by the gas war which he alone started. (Tr. 106).

It is absurd to say on this evidence that Phillips and these four individual appellees with their four gasoline stations had the power to drive all of the other major oil companies and "independent" stations out of business and thus create a monopoly, or that they had the power to create a dangerous probability of such a result.

The rule regarding specific intent merits further elucidation. As pointed out in *Centanni, supra*, specific intent to monopolize is absolutely required to prove an *attempt* to monopolize under Section 2 of the Sherman Act; and the power to monopolize or to create a dangerous probability of monopolization is necessary to prove *any* violation of Section 1 or Section 2. Thus, the question of specific intent does not become material until such power is proved. The power has not been proven herein and appellant's case therefore falls at that point. But if it be assumed, *arguendo*, that the power has been proved, then the rule with regard to specific intent changes. As is said in *United States v. New York Great A & P Tea Co.*, 67 F. Supp. 626, 642, D.C. .



"Dealers have the right to sell freely without restraint. Have defendants unreasonably crippled that right? Such is our real question. Defendants have the right to set prices at such figures as to meet competition. *It is only when price cutting extends to destruction or unreasonable restraint of competition or taking losses in order to attain an ultimate monopoly or partial monopoly that the law is violated.* * * * The (plaintiff) must prove either that there was a specific wrongful intent to effect restraint of trade or that the acts of defendants had the inherent tendency necessarily unreasonably to restrain trade. As Mr. Justice Lurton said (*United States v. Reading Co.*, 226 U.S. 324, 33 S. Ct. 90, 103, 57 L. Ed 243): 'Whether a particular act, contract or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful

cases, turn upon the intent to be inferred from *the extent of the control thereby secured over the commerce affected*, as well as by the method which was used. Of course, if the *necessary* result is materially to restrain trade between the states, the intent with which the thing was done is of no consequence.' (Citing cases)." (Italics ours, parenthesis ours).

Thus, the rule is that if the power to monopolize is proved, then the plaintiff must go further and prove either a specific intent to restrain trade and build a monopoly, or that such is the *necessary* result of the conspiracy.

Now, all that has been shown in the instant case is that the individual appellees lowered the price of gasoline in their stations, and as is stated in the last quoted case, they had a perfect right to do this, so long as they were merely competing in the market. There is no evidence to show that they were doing anything else. There is nothing to show that the price cutting here extended "to destruction or unreasonable restraint of competition or taking losses in order to attain an ultimate monopoly or partial monopoly". Evidence of "specific

wrongful intent" is wholly lacking. The record is likewise devoid of evidence that such reduction of prices by appellees "had the inherent tendency *necessarily unreasonably* to restrain trade". (Italics ours). The most that can be said for the evidence is that it merely shows appellees lowered their prices. Certainly, Uniform Oil Company has no vested right to restrain all of the other retail gasoline dealers in Helena for all time from lowering their prices. *Nevertheless, this is precisely the contention and position of Uniform Oil Company.*

All that is said above assumes, arguendo, that an agreement (conspiracy) between the appellees to reduce prices was proved. But, in fact, the record is devoid of such proof, and no such agreement, in the context of this case, can be inferred from the mere fact that prices at the different stations were lowered at about the same time and that Bridges, as a courtesy, supplied Cullen, Gardner and Norwood with signs for the display of prices. In a different context, this sort of evidence, circumstantial at best, might be of some value, but it is certainly not sufficient to infer a conspiracy in this case. Conscious parallelism in reduction of prices is the most that is shown.

It is respectfully submitted that the appellant wholly failed to carry its burden of proof on the matter of statutory violation.

2. Burden of proof on the matter of damages.

(a) Injury to the public. Before the plaintiff can recover for any alleged damage to itself, it must *first* prove injury to the public from the alleged violation by the defendants. As is said in *Shotkin v. General Electric Co.*, 171 F. 2d 236, C.A. 10th (1948):

"Injury to plaintiff, of itself and alone, is not sufficient to warrant a civil action of this nature for injunctive relief and damages. There must be harm to the general public in the form of undue restriction of trade and commerce as the result of the wrongful contract, combination, or concert.

(Citing cases)." (Parenthesis ours).

Not even an attempt was made by Uniform Oil Company to prove any injury to the public. On the contrary, the inference to be drawn from appellant's own evidence is that the public derived vast financial benefit from the reduction of gasoline prices in Helena. To sustain Uniform Oil here would be to confer upon it a vested right to have the prices of its alleged competitors forever crystalized at levels substantially above its prices. Any concerted lowering of prices by even a very small segment of its alleged competitors would be subject to injunction, treble damages and criminal

prosecution. Conferring such a right upon Uniform Oil would defeat the purpose of the Sherman Act, which is to insure competition. Of course, this is the reason for the rule that injury to the public must be first *proved* by competent evidence. Stated another way, the rule simply says that conduct not resulting in proved injury to the public is no violation of the Sherman Act. Appellant's case falls at this point.

(b) Injury to Uniform's business or property. Even if Uniform Oil had carried its burden thus far, that would not be sufficient. It had to go further and *prove* that it "suffered an injury to its business or property *susceptible of being described with some degree of certainty in terms of money damages*". (Italics ours). *Continental Ore Co., supra*. Here, again, the failure of proof is complete. As is said in *National Wrestling Alliance v. Meyers*, 325 F. 2d 768, 777, C.A. 8th (1963):

"Proof essential to recovery of damages in antitrust litigation has been the subject matter of many Clayton Act claims, as revealed by authorities cited (above). The rule thereby established may be summed up thus: The fact of damages, as well as the amount thereof, is entirely a question of sufficiency of evidence. In every case, the question

is whether the *data* of which the evidence consists is such that a just and reasonable *inference* and *estimate* thereof can reasonably be drawn from the evidence *so that a verdict will not be based on mere speculation or guesswork*. The usual common law standards are to be applied in establishing the fact, as well as the extent of the injury in such cases." (Italics ours).

In addition to proving the damages themselves with reasonable certainty as to amount, by presenting data from which such amount can be inferred or estimated, plaintiff must prove that the defendants' violation of the Sherman Act *was the most probable, proximate cause of the damages*. (*Siegfried v. Kansas City Star Co.*, 193 F. Supp. 427, D.C. Mo. (1961)).

Uniform Oil in this case totally failed to meet the standard of proof, both as to the damages themselves and the causal relationship.

The only evidence presented on the subject of damages is contained in the testimony of John Vance at pages 42, 43, 44, 45 and 46 of the transcript, as follows:

"Q Now with reference to your damages:

How much did you pay for the station you had? * * *

"A We purchased the station from Lydia Magnuson for twenty-five thousand dollars.

"Q And what year was that?

"A 1961 or two. * * *

"Q And did you improve it?

"A Yes, we did.

"Q And how much monies did you put in improvements during --

"A We put in, two occasions, new pumps and concrete mats for the pumps to rest on, and that was about the extent of improving the property, except for a neon sign and some overhead high density service station type lights, lighting equipment.

"Q And did you develop the business out there as the time went along?

"A Yes, we did.

"Q Did you have an increase in volume?

"A Well, we started with nothing and built the business up to in excess of two hundred thousand gallons a year, and during the last year it plummeted down again to next to nothing. Sixty thousand gallons, I think..

"Q What happened to the business?

"A Well, following the reduction in price, and the rest of the major stations meeting that reduced price, we were unable to continue in the same scale we had and the business deteriorated and ultimately closed it up.* * *

"Q Now, at the time that you closed the station up was the station indebted?

"A Yes. At that time we had lost that last year in excess of twelve thousand dollars. We owed fourteen thousand, over fourteen thousand dollars to our supplier, Big West Oil Company.

"Q And how did you pay that off? * * *

"A THE WITNESS: We settled with the Big West Oil Company at the time we sold the station. We sold ten feet to the highway commission for the expansion of Euclid Avenue, and we sold the remainder of the station to Tom Connelly in Butte, who runs the Town Pump, I believe. And we were able to settle that fourteen thousand five hundred dollar debt to the Big West Oil Company .

with a payment to them of eleven thousand dollars and deed to the pumps and equipment that were present on the station. * * *

"Q Do you have an opinion as to the value of that business as a going business prior to the time that this -- of the gas reduction? * * *

"THE WITNESS: Yes, I do.

"BY MR. SKEDD:

"Q "And what was the value of that business?

"A As a going business I would say that that business was certainly worth sixty thousand dollars."

There is absolutely no other evidence in the record on the subject of damages or the cause of damages.

There is no "data.....such that a just and reasonable inference and estimate (of damages) can reasonably be drawn". The witness says that in 1961 the station was purchased for \$25,000.00; that it was improved; that they "built the business up to in excess of 200,000 gallons a year"; that "during the last year it plummeted down again"; that "following the reduction in price we were unable to continue in the same scale we had and the business deteriorated and ultimately closed it up"; that the corporation was indebted in the sum of .

\$14,000.00 to the supplier; that they settled with the supplier for \$11,000.00 and the pumps and equipment; that they sold "ten feet" to the highway commission for an undisclosed amount and sold "the remainder of the station to Tom Connelly" for an undisclosed amount; that in the witness' opinion the value of the "business" prior to the reduction in gasoline prices was \$60,000.00.

How can it be said that this evidence proved "that plaintiff has suffered an injury to his business or property *susceptible of being described with some degree of certainty in terms of money damages*"? (Italics ours). On this evidence, how could a jury even guess or speculate as to an amount of damages?

This court has been even more specific as to the standard of proof of damages. In *Standard Oil Company of California v. Moore*, 251 F. 2d 188, Cert. Den. 356 U.S. 975 (1958), the plaintiff claimed destruction of his retail gasoline business arising from the defendants' refusal to sell him gasoline. This court said:

"In measuring the value of the good will of such a business, appropriate factors to be considered are: (1) What profit has the business made *over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner*? (2) What is the reasonable

prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation? See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16-17, 69 S. Ct. 1434, 93 L. Ed. 1765. These are the factors which would influence a prospective purchaser." (*Italics ours*).

That sort of evidence is totally absent from the instant record.

In *Flintkote v. Lysfjord*, 246 F. 2d 368, 394 (1957), this court said:

"There are three chief types of evidence which the decisions have approved as the basis for the award of damages. (1) Business records of the plaintiff or his predecessor before the conspiracy arose. (2) Business records of comparative but unrestrained enterprises during the particular period in question. (3) Expert opinion based on items (1) or (2). (p. 392) * * *

"We do not hold nor imply that a jury verdict could not be upheld under any circumstances solely on the testimony of

the plaintiffs. We hold only that if they are qualified to make these estimates, *the record must show their competency and the factual basis upon which they rest their conclusions.*" (p. 394).

(Italics ours).

Again, in *Lessig v. Tidewater Oil Company*, 327 F. 2d 459, 473, 474, this court said concerning the admissibility of the plaintiff's opinion as to lost profit:

"Such opinion testimony is admissible, but only if based upon facts which rationally support it. The offer of proof was simply that it was Lessig's opinion, based upon his experience and knowledge, that but for Tidewater's restrictive practices his earnings would have approximated seven hundred dollars a month, or about four hundred dollars per month more than he in fact averaged. *There was no offer to show how his estimate was made. The testimony was inadmissible, absent this foundation, and it was excluded upon that express ground.*" (pp. 473, 474). (Italics ours).

Mr. Vance's conclusion as to the value of Uniform's business as a "going concern" was objected to by all

appellees on the grounds he was not qualified to answer and no sufficient foundation laid.

It is respectfully submitted on the basis of the foregoing authorities that there was a total failure of proof of damages.

As to the question of proximate cause, the record is completely blank. Mr. Vance does not even say that the loss of business resulted from the fact that appellees reduced their prices. He does not say (and it appears nowhere else in the record) how long that reduction continued. He does not even say that he thinks this was the cause; or that it was the most probable cause; or that there were no other factors in existence which did affect or might have affected the condition of appellant's business.

As this court said in *Continental Oil Co. v. Union Carbide & Carbon Corp.*, 289 F. 2d 86, 90 (1961):

" * * * It is well appreciated that a plaintiff has a difficult task in an anti-trust suit and that adherence to strict requirements of proof as to exact quantity of damage may deprive him of the substance of his rights. The law has gone far to ease that burden by permitting proof of losses which border on the speculative, in order to implement the policy of the

anti-trust laws. But a fair degree of certainty is still essential to show the causative relation of defendants' misconduct and plaintiff's injury.' " (Italics ours).

It is respectfully submitted that appellant has totally failed to carry its burden of proof on both damages and causal relation.

No Proof That Bridges, Cullen, Gardner
and Norwood Were in Competition with Uniform Oil

The amended complaint specifically charges the defendants with a conspiracy whose intent and effect was to eliminate competition from the "independents", including Uniform Oil. It was therefore necessary for Uniform Oil to prove that at the time the defendant retail dealers allegedly conspired they were actually in competition with Uniform Oil. Evidence of this is completely absent. Indeed, the only evidence on this subject is contained in the testimony of Bridges, who emphatically stated that he was not in competition with Uniform Oil, nor were Cullen, Gardner or Norwood. (Tr. 105, 106).

No Evidence of Intent to Raise Prices Back
up to "a Higher Pre-determined Level"

The amended complaint charges that the final aim of the conspiracy was to raise prices back up to a higher pre-determined level. Proof of such an intent was surely indispensable to Uniform's claim, for indeed, without it .

the alleged conspiracy would be incredible. Again, the record is silent. The matter was never even mentioned, and for lack of this vital proof, Uniform's claim must fall.

No Evidence of Any Effect on
Interstate Commerce

As is said in *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F. 2d 732 (1954), Cert. Den. 348 U.S. 817 (1954):

"Whether a purely local or intrastate conspiracy reasonably restrains interstate commerce is primarily a *factual question*, i.e., does the local price fixing conspiracy affect substantially the flow of interstate commerce? * * * In fact, *unless there is a finding that the local and intrastate activities complained of and as alleged in the indictment, substantially affected interstate commerce, there is no jurisdiction in a district court over the alleged Sherman Act violation*." (Italics ours).

See also *C. A. Page Publishing Co., Inc. v. Work*, 290 F. 2d 334, Cert. Den. 368 U.S. 875 (1961); *Marietta Page v. Work*, 290 F. 2d 323 (1961). (These are civil cases).

In *C. A. Page Publishing Co., Inc.*, *supra*, this court held that:

"The so-called qualitative test of the illegal per se doctrine does not itself operate to extend federal jurisdiction under Sections 1 and 2 to purely local restraints applied at a local level to a product which never enters into the flow of interstate commerce. *The argument made here by appellant has been squarely rejected by this Court in Las Vegas Merchant Plumbers Ass'n v. United States*, 9 Cir., 1954, 210 F. 2d 732, 747 * * *".
(Italics ours).

There is simply no evidence in this record to support any factual finding that the products here involved were in the flow of interstate commerce, and, indeed, we find no contention in appellant's brief that such was the case.

What the record does show is that all of the transactions testified to were *wholly* intrastate in character.

Plaintiff had the burden of showing under the last cited authorities that the alleged price fixing conspiracy was *in* interstate commerce, and there was simply a complete failure of proof in this regard.

Nor is there a scintilla of evidence to support a factual finding of any substantial *effect* on interstate commerce.

On the contrary, the only thing the evidence shows was that the gasoline sold by appellant came either from the Big West refinery at Kevin, Montana, or from the Yellowstone pipeline. Gasoline from that pipeline "was refined in Billings (Montana), mostly from crude, from the Elk Basin Field in Wyoming". (Parenthesis ours). (Tr. 13).

The most that could be drawn from this is the *inference* that some of appellant's gasoline might have been refined from crude out of Wyoming, but this obviously is not subject to inference and must be proved by direct evidence.

All of the cases respecting retail sale of gasoline hold that while there may be certain interstate aspects in the acquisition by the retailer of products and equipment, the retail sale itself is purely intrastate in character. (*Savon Gas Stations No. 6 and A. & H. Transportation, Inc. v. Shell Oil Company*, 203 F. Supp. 529 (1962); *Mitchell v. Livingston & Thebaut Oil Company*, 256 F. 2d 757 (5 Cir. 1958); *Brenner v. Texas Company*, 140 F. Supp. 240 (D.C., N.D., Cal. 1956); *Dial v. Hi Lewis Oil Co.*, 99 F. Supp. 118 (D.C., W.D., Mo. 1951); *Myers v. Shell Oil Co.*, 96 F. Supp. 670 (D.C., S.D., Cal. 1951); *Spencer v. Sun Oil Co.*, 94 F. Supp. 408 (D.C., Conn. 1950); *Brosious v. Pepsi-Cola Co.*, 155 F. 2d 99

(3 Cir. 1946); *Lewis v. Shell Oil Co.*, 50 F. Supp. 547 (D.C., N.D., Ill. 1943).

Even assuming that some of the gasoline sold came ultimately from Wyoming crude, which was not proved, the record is simply devoid of any evidence of a substantial effect on interstate commerce.

What is said above applies equally to the testimony concerning credit cards.

We find no argument in appellant's brief on this subject of interstate commerce.

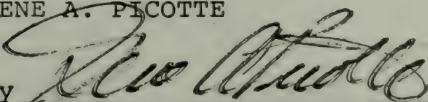
It is respectfully submitted that there was no proof that the alleged conspiracy was in interstate commerce, or of substantial effect on interstate commerce, and that on this ground alone, the district court was correct in sustaining the motions for directed verdict, which were made on this ground, among others.

CONCLUSION

Appellant was guilty of multiple failures to prove the essential elements of its claim, any one of which failures necessitated the granting of the motions for directed verdict. The judgment of the trial court should be affirmed.

Respectfully submitted,

HENRY LOBLE
GENE A. PICOTTE

By  .

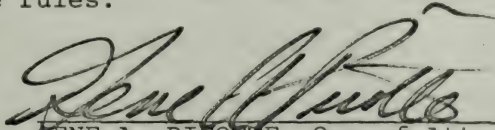
Attorneys for the Individual
Appellees, Bridges, Cullen,
Gardner and Norwood

Address:

833 North Main St.
P. O. Box 176
Helena, Montana 59601

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


GENE A. PICOTTE, One of Attorneys
for Individual Appellees, Bridges,
Cullen, Gardner and Norwood.

Address: 833 North Main Street
P. O. Box 176
Helena, Montana 59601

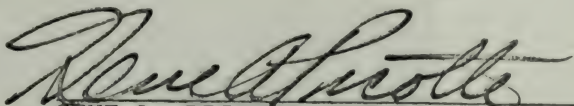
CERTIFICATE OF SERVICE BY MAILING

I, GENE A. PICOTTE, one of attorneys for the individual appellees, hereby certify that the foregoing BRIEF ON APPEAL OF THE INDIVIDUAL APPELLEES, BRIDGES, CULLEN, GARDNER AND NORWOOD, was duly served on each of the following:

Mr. Kendrick Smith
Corette, Smith, Dean & Robischon
Attorneys at Law
Professional Building
Butte, Montana
Attorneys for Appellee, Phillips Petroleum Co.

Mr. Lloyd J. Skedd
Attorney at Law
Third Floor, Horsky Block
Helena, Montana
Attorney for Appellant

by mailing three (3) copies to each, at their last known address as set forth above, this 13th day of September, 1967.

A handwritten signature in cursive script, reading "Gene A. Picotte". The signature is written in dark ink and is positioned above a horizontal line.

GENE A. PICOTTE, One of Attorneys for
Individual Appellees, Bridges,
Cullen, Gardner and Norwood.

Address: 833 North Main Street
P. O. Box 176
Helena, Montana 59601

No. 21803

IN THE
United States
Court of Appeals

For the Ninth Circuit

UNIFORM OIL COMPANY,
a Montana corporation,

Appellant,

vs.

PHILLIPS PETROLEUM COMPANY,
a Delaware corporation,
W. J. BRIDGES, DONALD W. CULLEN,
CURTICE GARDNER and JAMES H.
NORWOOD,

Appellees.


Appellant's Brief on Appeal

LLOYD J. SKEDD
Horsky Block
Helena, Montana
Attorney for Appellant.

FILED

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 B. LUCK, CLERK

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IN THE

United States

Court of Appeals

For the Ninth Circuit

UNIFORM OIL COMPANY,
a Montana corporation,

Appellant,

vs.

PHILLIPS PETROLEUM COMPANY,
a Delaware corporation,
W. J. BRIDGES, DONALD W. CULLEN,
CURTICE GARDNER and JAMES H.
NORWOOD,

Appelles.

Appellant's Brief on Appeal

JURISDICTIONAL STATEMENT

This action was commenced by Appellant in the United States District Court for the District of Montana, Helena Division, on March 30, 1964, under the Anti-Trust Laws of the United States. 15 U.S.C. Section 1, 2, 15 and 26 (Record [Amended Complaint]—P. 2).

The Appellant, a Montana Corporation, was the owner and operator of a retail gasoline and service station in the City of Helena, Montana (Record

[Amended Complaint]—P. 2, 4) as an “Independent”.

The Appellee, Phillips Petroleum Company, was a Delaware Corporation, engaged in the business of manufacturing gasoline and other petroleum products, and selling the same, both at wholesale prices to dealers and at retail prices directly to consumers, throughout the United States, including the City of Helena, Montana (Record [Amended Complaint]—P. 2) as a “Major” oil company (Record [Amended Answer]—P. 9).

The Appellee, W. J. BRIDGES, was engaged in Helena, Montana as a bulk dealer handling the Appellee, Phillips Petroleum Company’s, products (Record [Amended Complaint]—P. 3) and also the owner and operator of a gasoline station in Helena, Montana selling Appellee, Phillips Petroleum Company’s, products. (Record [Amended Complaint]—P. 3).

The Appellee, DONALD W. CULLEN, was the sublessee and operator of a retail gasoline sales and service station in Helena, Montana (Record [Amended Complaint]—P. 3) selling products of Appellee, Phillips Petroleum Company.

The Appellee, JAMES H. NORWOOD, was the sublessee and operator of a retail gasoline sales and service station in Helena, Montana (Record [Amended Complaint]—P. 3) selling products of Phillips Petroleum Company.

The Appellee, CURTICE GARDNER, was the sublessee and operaor of a retail gasolin sales and service station in Helena, Montana (Record [Amended Com-

plaint]—P. 3) selling products of Phillips Petroleum Company.

Appellant purchased petroleum products, including gasoline, from an out-of-state supplier, which products were produced outside of the State of Montana and delivered to Appellant in interstate commerce. Appellant sold a substantial portion of its products to non-residents of the State of Montana for use in interstate commerce. Appellant honored all "Major" oil company credit cards and was paid for products purchased with these credit cards by an agency outside the State of Montana and the collection of such accounts were processed across state lines and Appellant was engaged in interstate commerce. (Record [Amended Complaint]—P. 4, 5).

All of the Appellees were similarly engaged in interstate commerce. (Record [Amended Complaint]—P. 5).

Appellants Amended Complaint alleges that Appellees combined and conspired to eliminate competition from the gasoline marketing industry in the City of Helena, Montana and in furtherance of their unlawful combination, conspiracy and common plan have combined and conspired to destroy the business of the Plaintiff and other "Independents" and eliminate from the City of Helena all of the "Independents". (Record [Amended Complaint]—P. 5).

The United States District Court for the District of Montana found that it did have jurisdiction.

This Court has jurisdiction of this appeal under 28

U.S.C. Sections 1291, 1294 and Rule 75 of the Federal Rules of Civil Procedure as set forth in Title 28 of the United States Code.

STATEMENT OF THE CASE

The questions involved in this Appeal, and the manner in which raised, are set forth in the specifications of error which are each set forth separately hereinafter in this statement of the case; but generally consist of the rejection of Exhibits and evidence offered by the Appellants and the granting of motions for directed verdicts in favor of the Appellees, after the close of Appellant's case.

For convenience, the Appellant, Uniform Oil Company, shall hereinafter be referred to as "Uniform Oil Company"; the Appellee, Phillips Petroleum Company shall be referred to as "Phillips" and Appellees, DONALD W. CULLEN, CURTICE GARDNER, and JAMES H. NORWOOD shall be referred to by their respective last names.

The Uniform Oil Company was formed in late 1960, or 1961, (Tr. 8) for the purpose of engaging in the business of selling gasoline and other products as an "Independent" and commenced its business in 1962. The term "Independent" is normally used in the gasoline industry to identify and independent gasoline dealer from one connected with a "Major" oil company, either by lease or as a supplier of a branded product. The "Independent" sells in his own name, does not own a refinery or his own products, nor does he have the

benefit of national advertising and generally, throughout the industry, sells gasoline for approximately two cents less per gallon than a major company (Tr. 9).

The major oil companies sold well in excess of eighty per cent of all the gasoline sold in the State of Montana, and throughout the City of Helena, Montana. (Tr. 27).

Uniform Oil Company purchased gasoline directly from a refinery in Sunburst, Montana, and from the Yellowstone Pipe Line, which extends from Billings, to Spokane, Washington. (Tr. 12). The pipeline was owned by various major oil refineries and transported, through its pipeline, gasoline refined in Billings, Montana, from crude oil originating in the Elk Basin Field, Wyoming. (Tr. 13).

Uniform Oil Company honored all major oil company credit cards and was paid for the products purchased by the use of these credit cards by the Big West Oil Company, less six per cent carrying charge, on accounts processed in Spokane, Washington by mail. (Tr. 10, 11).

Phillips Petroleum Company, a Delaware Corporation, was a major oil company, engaged in the business of manufacturing gasoline and other petroleum products and selling the same throughout the United States, including the City of Helena Montana. (Record P. 3, 9)

W. J. BRIDGES, was a bulk dealer in Helena, Montana and prior to 1961 delivered gasoline to Phillips Petroleum Company's stations in Helena, as "con-

signee", after 1961, BRIDGES continued as bulk dealer for Phillips Petroleum Company but became a "Jobber" (Tr. 59, 60, 61, 62). Phillips Petroleum Company, at this time, leased the stations, including the one owned by W. J. BRIDGES, to W. J. BRIDGES and he, in turn, arranged for the "Operators" on an oral agreement furnishing the station and certain equipment on a rental basis of one cent per gallon of gasoline sold. (Tr. 63, 64, 65).

DONALD W. CULLEN, CURTICE GARDNER, and JAMES H. NORWOOD were "Operators" of gasoline stations in the City of Helena, Montana, under the brand name of the Phillips Petroleum Company, using its advertising and standard designed uniforms, and on the basis set forth above. (Tr. 65, 67, 70).

Phillips Petroleum Company had control over the operations of W. J. BRIDGES by use of the lease agreement, (Tr. 63, 64), national advertising, uniform station appearance and National Credit Cards. (Tr. 117, 118, 119). During the month of March, 1964, W. J. BRIDGES met in Spokane, Washington with his "boss" and other management personnel of the Phillips Petroleum Company and discussed gasoline prices. (Tr. 73, 74, 75, 76, 79, 80, and 81). W. J. BRIDGES also in the month of March, 1964, met with the "Operators", DONALD W. CULLEN, JAMES H. NORWOOD, and CURTICE GARDNER, and one DON HAMILTON, representative of Phillips Petroleum Company, and discussed lowering of gasoline prices, the matter of the "Independents" operation and the lowering of the

prices of gasoline to 33.9 cents per gallon (Tr. 132, 158, and 159).

After these meetings (in Spokane and with the "Operators", including the Phillips Petroleum Company representative) on or about March 28, 1964, W. J. BRIDGES furnished each of the stations with large signs, commonly used for gas wars, (Tr. 83, 84) and on each station posted the same price for gasoline lower than the Uniform Oil Company and other Independents. The price of gasoline was reduced by these Phillips operators from 38.4 cents per gallon to 33.9 cents per gallon, (Tr. 32), which reduced price continued into the fall of 1964.

Uniform Oil Company commenced this law suit on March 31, 1964, served all of the parties named, including Phillips Petroleum Company, and thereafter in the month of July, 1964, Phillips Petroleum Company paid a subsidy which insured the "Operators" a five cents a gallon profit, regardless of how low the price descended. (Tr. 169, 92, 93).

SPECIFICATION OF ERROR

The statement of points heretofore filed in this Appeal contain ten Specifications of Error (Record 65, 66). Appellant will not argue the first six statement of points, as the same pertain to the rejection of Appellant's preposed Exhibits One through Four, inasmuch as the testimony contained in the offered Exhibits was also introduced by the testimony of the witness, JOHN VANCE.

SPECIFICATION OF ERROR No. I

The Court erred in refusing the testimony of JOHN VANCE with reference to a meeting in the Steamboat Block in Helena, Montana, in the month of March, 1964, and in denying the offer of proof with regard to his proposed testimony (Tr. 32-40). The proceedings in the trial with reference to this evidence is set out as follows:

Q. "Now, during the month of March, 1964, did you have occasion to attend a meeting in the Steamboat Block—

A. Yes, I did.

Q. —in Helena, Montana?

A. Yes.

Q. And at that meeting who was present?

A. Well, most of the retail operators, those who sold gasoline at retail to the public in Helena, and several who were also wholesalers or jobbers.

Q. Now with reference to anyone named in this lawsuit, were any of those people at the meeting.

A. I think—and I am not sure, but I think that all of them were there.

Q. Was Mr. Bridges there?

A. I think so, but I don't—I really don't remember. There were, I would say, twenty or thirty people there, and, of course, service stations stay open a long time, so, undoubtedly, a percentage of people in the business in Helena were not there because they were keeping their stations open.

Q. But you said you attended the meeting?

A. I did.

Q. Do you recall the day?

A. No. It was—after the middle of March is about the closest I could come to pinpointing the day.

Q. Do you recall the day of the week?

A. No, I do not.

Q. And who called the meeting?

A. Well, the meeting was called by the retail gasoline dealers association here in Helena and, as I recall—and again my memory may fail me, but as I recall Lloyd Dickey presided at the meeting.

Q. What is this retail gasoline dealers association?

A. It is an association of the dealers in Helena, and it had been through the years quite active. Prior to this meeting it had not been very active.

Q. And what did it consist of? What—

A. It consisted of the men who were in the gasoline business.

Q. Did that include all of the people in the gasoline business?

A. I don't know the entire membership. But I suspect a majority.

Q. A corporation? Is it a corporation or association?

A. No. I think association.

Q. Did it have regular officers?

A. Yes, it did.

Q. And who were the officers at that time?

A. I don't know, but I assume Lloyd Dickey was the president.

Q. Were you a member of the association?

A. As I recall Uniform Oil Company was not a member of the association.

Q. Then how come you went to the meeting?

A. I was invited to come to the meeting to attempt to forestall a price war.

Q. What was the purpose of the meeting?

A. To attempt to forestall a price war. Everybody was terribly concerned about Phillips reducing the price.

Q. And then—

MR. PICOTTE: Move the witness' answer be stricken as hearsay, Your Honor, and the jury instructed to disregard it.

THE COURT: It may; and the jury will disregard the answer.

BY MR. SKEDD:

Q. Did you receive a written notice of the meeting?

A. I don't recall.

Q. But you attended?

A. I did.

Q. Now, what was—then was there a discussion had at the meeting with reference to prices?

A. Yes, there was.

Q. And what was the general discussion with regard to prices?

MR. SMITH: May it please the Court, we are going to object to any testimony unless it be confined to that portion of the matter in which a discussion was had between this witness and Mr. Cullen to which reference has previously been made in the pre-trial orders and responses to pre-trial orders.

MR. PICOTTE: Same objection from the individual defendants.

THE COURT: What were you intending to bring out here?

MR. SKEDD: The purpose of the meeting; the discussion at the meeting with regard to the prices, and statements made by Bridges and the other individual defendants at that time.

THE COURT: Are they mentioned in the pre-trial?

MR. SKEDD: They are mentioned in the pre-trial statement, yes.

THE COURT: Well, be careful, and stay within that. The objection will be overruled.

MR. PICOTTE: Court please, very crucial thing; I wonder if this might warrant some discussion between Court and counsel before we proceed with it, based on what happened to it during the pre-trial proceeding?

THE COURT: Well, his pre-trial responses talk

about this meeting in the Steamboat Block. I recall that much of them, when they do discuss statements made by these various defendants.

MR. SKEDD: Trying to find it, Your Honor, so I can stay within it.

(Pause while Mr. Skedd looks through papers).

BY MR. SKEDD:

Q. Now confine yourself, if you can—

THE COURT: This is in page two, item three.

MR. SKEDD: Yes; W. J. Bridges; Lloyd Dickey; Bryant Anderson; Jim Higgins; John Vance and others constituting a majority of the retail gasoline—

THE COURT: That other business isn't going to cover anything; so stay with the named people.

MR. PICOTTE: I would like to voir dire, if I may, Your Honor, on foundation? If he is going to offer the conversation now.

THE COURT: You may. In view of the witness' statement with respect to his memory as to the persons present, you can voir dire on that.

MR. PICOTTE: Yes, that is exactly what I wanted to do, if I may, Your Honor.

VOIR DIRE EXAMINATION

BY MR. PICOTTE:

Q. Mr. Vance, the conversation that you are referring to is with J. Bridges, this defendant here (indicates) one of the participants therein?

A. I am not sure what the conversation is, perhaps—did I just say—did I refer to a conversation? I referred to a meeting—

MR. SKEDD: At the meeting.

THE WITNESS:—and persons present, as I remember.

MR. PICOTTE: Obviously, if the Court please, the witness doesn't understand the confinement of the proof here by the Court's previous order, and I don't know that that is a suitable subject for the jury or not.

MR. SKEDD: I would like to discuss this with

the Court, too, out of the presence of the jury.

THE COURT: Very well, we will be in recess for five minutes and I will see counsel in Chambers.

(The following is a conference reported in Chambers):

THE COURT: Go ahead, make your offer of proof.

MR. SKEDD: Comes now the Plaintiff and offers to prove through the witness on the stand, John Vance, that at a meeting of the Retail Gasoline Dealers Association in Helena, Montana, at the Steamboat Block in the month of March, 1964, that the purpose as stated for the meeting was to prevent the Phillips Petroleum Company from lowering its prices and starting a gas war; and that at that meeting either the defendant Bridges or the individual defendants stated that the Phillips Petroleum Company was putting the pressure on Bridges—

THE COURT: Who said this?

MR. SKEDD. Either Bridges or the individual defendants.

THE COURT: And you don't know which one?

MR. SKEDD: No.

And that the members, or the persons attending the meeting requested of Bridges that he not lower the prices in the City of Helena and community, because it would start a gas war.

MR. PICOTTE: Is that it?

MR. SKEDD: Yes.

MR. PICOTTE: I had better make my objection first, don't you suppose, counsel—

MR. SMITH: Yes.

MR. PICOTTE:—because you are going to—

To which the individual defendants object on the following grounds: One, incompetency. Two, that as to any statements made by anyone other than the individual defendants, it would be hearsay. Three, that such evidence would be inadmissible as to any one of the individual defendants

who could not be identified by the witness on the stand. Four, that it is irrelevant and immaterial; not probative of any issue in this case, and, specifically, not probative because pressure by Phillips would not be relevant to a conspiracy. In fact, it would be a hundred and eighty degrees from a conspiracy.

MR. SMITH: The defendant Phillips objects to this offer of proof, first of all, on the ground that it is hearsay. There being no showing that any person representing Phillips was present.

Second, on the ground and for the reason that Mr. Vance has already identified at least Mr. Bridges as being a jobber, and not any way an agent of Phillips.

Third, on the ground that there has been no agency relationship shown which would in any way bind Phillips.

Next, on the ground that the identity of the speaker—whether it be Bridges or other individual defendants—has not been shown and, apparently, cannot be shown; and that this would be hearsay two or three times removed so far as Phillips.

And lastly, that it is inadmissible for any purpose in the lawsuit, and, let me say, comes within the cautionary instruction which the Court has given to the jury, and shows how far the defendant Phillips would be placed at a disadvantage by this type of evidence being introduced.

THE COURT: Well, the objection will be sustained except to the extent, if you can, you may prove that Bridges was asked not to lower prices—that much. If you can prove that somebody requested Bridges not to lower his prices I will permit that to be proved.

But insofar as Phillips is concerned, certainly it isn't bound by anything that is done here.

MR. SKEDD: Unless we can show this agency. Or show or be inferred by the very nature of the operation that it is, in fact, an agency.

THE COURT: Well, from anything I see you

are going to have to prove that as foundation first, because I don't think you can do it from what I read of the depositions, so on. So you would have to do that first. And Phillips, to date, isn't in this meeting.

Now, as to the individual defedants, I don't think it is fair for a witness to say: Well, someone of these people said something. Because then, if I admit it, the jury has got to pick out which one said it, and maybe tagging it on somebody that didn't say it; because it is only, probably, useful against the one that did say it."

SPECIFICATION OF ERROR No. II

The Court erred in its finding of fact (if it is a finding) (Tr. 181).

"That as the Court views the evidence there is not sufficient evidence now, if it be assumed that a conspiracy has been proved as to the individual defendants, to indicate that the Defendant, Phillips Petroleum Company, had any knowledge of that conspiracy. The act of Phillips, as the Court views it in granting what has been variously referred to as the subsidy and the competitive price adjustment, in the Court's opinion would not be sufficient to make them guilty of an antitrust violation in the absenue of some knowledge that an illegal conspiracy had been created by the individual defendants." (Tr. 181).

SPECIFICATION OF ERROR No. III

The Court erred in granting Defendant, PHILLIPS PETROLEUM COMPANY, Motion for Directed Verdict. (Tr. 180).

SPECIFICATION OF ERROR No. IV

The Court erred in granting the Motion of W. J. BRIDGES, DONALD W. CULLEN, CURTICE

GARDNER and JAMES H. NORWOOD for a Directed Verdict. (Tr. 191).

ARGUMENT

Since the entire Argument relates to the taking of the case from the jury, by the Court, and because the Court did not make detailed findings of fact, the Specifications of Error shall be combined as one.

SUMMARY

The evidence presented was sufficient to raise a jury question as to whether Phillips, the "Jobber" Bridges, and the "Operators", Norwood, Cullen and Gardner conspired to fix gasoline prices, and attempted to monopolize the gasoline trade in the City of Helena, Montana, in violation of the Sherman Act and caused damages to Appellant recoverable under the Clayton Act.

I.

ANTI-TRUST LAWS INVOLVED

The anti-trust laws under which this case was brought are set forth in part as follows:

Section 1 of the Serman Antitrust Act [15 U.S.C.A. §1], *dealing with restraints of trade, provides that*

"Every contract, combination * * * or conspiracy, in restraint of trade or commerce * * * is * * * illegal * * *."

Section 2 of the Sherman Antitrust Act [15 U.S.C.A. §2 declares that:

"Every person who shall monopolize, or attempt to monopolize, * * * or conspire with any other person * * * to monopolize any part of the trade

or commerce * * * shall be * * * guilty of a * * * [violation of the anti-trust laws].”

Section 4 of the Clayton Act [15 U.S.C.A. § 15] authorizes:

“Any person who shall be injured in his business or property by reason of anything forbidden in antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”

The purpose of the Sherman Antitrust Act is to preserve and advance our system of free, competitive enterprise; to encourage, to the fullest extent practicable, free and open competition in the market place; and to prevent the accomplishment of a monopoly in any business or industry; all to the end that the consuming public may receive better goods and services at a lower cost. So, any unreasonable interference, by contract, or combination, or conspiracy, with the ordinary, usual and freely-competitive pricing or distribution system of the open market in interstate trade and commerce, constitutes an unreasonable restraint of interstate trade, and is a violation of the Federal antitrust laws. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), reh. denied 340 U.S. 939, 71 S.Ct. 487, 95 L.Ed. 678; *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S. Ct. 915, 92 L.Ed. 1260 (1948); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940), reh. denied 310 U.S. 658, 60 S.Ct. 1091, 84 L.Ed. 1421; *I. Toulmin, Anti-Trust Laws of the United States* Ch. 4 (1949).

II. EVIDENCE PRESENTED

A. *Interstate Commerce*

Gasoline purchased by Appellant was obtained from the Yellowstone Pipe Line, which extends from Billings, Montana, to Spokane, Washington (Tr. 12). The pipeline was owned by various major oil refineries and transported, via the pipeline, gasoline refined in Billings, Montana, from crude oil originating in Elk Basin Field, Wyoming (Tr. 13). Appellants honored all major oil company credit cards and was paid for these products on accounts processed in Spokane, Washington, by mail. (Tr. 10, 11).

Restraint of trade as used within the antitrust laws means in restraint of trade and commerce which takes place between persons or business organizations in one State and those in another State; that is to say, trade and commerce which moves or flows or takes place, not wholly within the boundaries of a single State, but across State lines from one State into one or more other States. To restrain interstate trade and commerce means, then, to interfere unreasonably with the ordinary, usual, and freely- competitive pricing or distribution system of the open market in interstate trade and commerce. *Simpson v. Union Oil Co.*, 337 U.S. 13, 84 S.Ct. 1051, 12 L.Ed. 2d 98 (1964) ; *Radian Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 364 U. S. 656, 660, 81 S.Ct. 365, 367, 5 L.Ed. 2d 358 (1961) ; *Klors v. Broadway-Hale Stores*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed. 23 741 (1959) ; *Apex Hosiery Co. v. Leader*.

The amount or quantity or value of the interstate commerce involved or affected by an unreasonable restraint of trade is immaterial. The Sherman Antitrust Act brands as unlawful any contract or combination or conspiracy, which would operate to restrain unreasonably any interstate trade and commerce, regardless of how small in amount or quantity or value. *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n. 59, 60 S.Ct. 811; *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167 (8th Cir. 1959), cert. denied 361 U.S. 884, 80 S.Ct. 155, 4 L.Ed. 2d 120 (1960); *United States v. Learner Co.*, 215 F. Supp. 603 (D. Haw. 1963).

B. *Persons Involved in Conspiracy.*

Phillips Petroleum Company is a Delaware corporation (Record [Amended Complaint] 2, [Answer] 9). W. J. Bridges, Donald W. Cullen, Curtice Gardner and James H. Norwood (Tr. 61-71) are individuals.

The Sherman Anti-trust Act when using the word "person" includes not only every individual, but also every corporation, partnership and every other organization, of every kind and character. *United States v. A & P Trucking Co.*, 358 U. S. 121, 79 S.Ct. 203, 3 L.Ed. 2d 165 (1958); *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975 27 A.L.R. 762.

C. *The Conspiracy*

Business Arrangement

The business arrangement between Bridges and Phillips was termed "Jobber" (Tr. 59), as distinguished from a "Consignee" (Tr. 59, 60). Phillips either owned or had leases on all of the gas stations involved (Tr. 62-70) and either leased or sub-leased them to Bridges, including a station owned by him (Tr. 63). Bridges then entered a verbal agreement with each of the "Operators", Cullen (Tr. 65), Norwood (Tr. 67) and Gardner (Tr. 70) to rent the stations on the basis of one (1) cent per gallon. Phillips advertised nationally and maintained a credit card system, designated as "Phillips 66"; each had uniform Phillips 66 painting (Tr. 117-118); Phillips representatives visited and inspected the stations (Tr. 121, 122). Regardless of the terminology used, Bridges was effectively under the domination and control of Phillips, and Bridges was, in turn, in complete control and domination of the "Operators". The jury may infer that Phillips gave Bridges authority to act for it in conspiracy to fix the gasoline prices.

A corporation is in law a person, but of course it cannot act otherwise through its directors, or officers, or employees, or other agents. The law therefore holds a corporation responsible for all unlawful acts of its directors, or officers, or employees, or other agents, provided such unlawful acts are done within the scope of their authority, as would usually be the case if done in the ordinary course of their employment, or in the

ordinary course of the corporation's business. Authority to act for a corporation in a particular matter, or in a particular way or manner, *may be inferred from the surrounding facts and circumstances shown by the evidence in the case. That is to say, authority to act for a corporation, like any other fact in issue in a civil case, need not be established by direct evidence, but may be established by indirect or circumstantial evidence. Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 38 S.Ct. 65, 62 L.Ed. 260 (1917); *Hartford-Empire Co. v. U.S.*, 323 U.S. 386, 65 S.Ct. 373, 89 L.Ed. 322 (1945), supplemented 324 U.S. 570, 65 S.Ct. 815, 89 L.Ed. 1198 (1945); *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719 (5th Cir. 1964).

Circumstances Involved

In middle March, 1964, Bridges met with his "boss" and other management personnel of Phillips in Spokane, Washington and discussed lowering gasoline prices (Tr. 73, 74, 75, 76, 79, 80 and 81) and asked for assistance. Also in March, 1964, Bridges met with the "Operators" Cullen, Norwood and Gardner and Don Hamilton, a representative of Phillips, and discussed the lowering of gasoline prices to 33.9 cents per gallon and the matter of the "Independents" operations (Tr. 132, 158, 159). Bridges furnished each of the stations with large signs commonly used for gas wars (Tr. 83, 84) on March 28, 1964 and on that day each lowered their prices on regular gasoline from 38.4 cents per gallon to 33.9 cents per gallon (Tr. 132), which reduced price continued until the fall of 1964.

In July 1964, Phillips paid a subsidy insuring the "Operators" a profit of five (5) cents per gallon, regardless of how low the price descended (Tr. 169, 92, 93).

Conspiracy is a combination of two or more persons, by concerted action to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of partnership, in which each member becomes the agent of every other member. The essence of a conspiracy is a combination or agreement to violate or to disregard the law. The evidence need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. What a preponderance of the evidence in the case must show, in order to establish proof that conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311, 128 A.L.R. 1044 (1940); *Eastern States Retail Lumber Dealers' Ass'n. v. United States*, 234 U.S. 600, 611, 612, 34 S.Ct. 951, 954, 58 L.Ed. 1490 (1914); *Girardi v. Gates Rubber Co. Sales Div., Inc.*, 325 F. 2d 196 (9th Cir. 1963); cf. *United States v. Standard Oil Co.*, 316 F.2d 884, 199 (7th Cir. 1963).

Curtice Gardner, one of the "Operators" testified

in a deposition taken October the 24th, 1966, made changes thereto later on and testified with regard each during the trial. The testimony of Curtice Gardner is set out in full in Appendix "A". Also for clarity, and for a comparison, portions of the deposition testified to at the trial, the changes made in the deposition, testimony at trial are set forth for the Court in Appendix "B".

Gardner first on deposition testified that Phillips set the prices (Tr. 123) ; in his deposition changes (Tr. 124) and on trial, he testified that he set the prices for gasoline sold at this station. (Tr. 125).

Gardner testified on deposition that he didn't know whether Phillips or Bridges set the prices, "it was just like it is right now. They tell you to put so much on the pump and that is what it goes" and that "they tell you the price you are going to sell it for?" (Tr. 127), later his testimony on deposition was changed to say he made the decision on the change of prices (Tr. 128) and on trial, said that he put the prices on the pumps (Tr. 126, 127).

Gardner on trial stated that the subsidy for keeping his price of gasoline low came from Bridges and he did not know who originated it (Tr. 139) ; in his deposition he stated that the subsidy "automatically come through, originally come from Phillips Company, I suppose." (Tr. 140).

Gardner testified on deposition that prior to the lowering of the price of gasoline the prices were on the pumps in small letters on the meter that ticks off

the amount of gasoline sold and computes the price (Tr. 141, 142); and that Jim Bridges put up a large gas war sign and that he knew that he didn't or his employees (Tr. 147); Gardner in his changes to deposition stated that he didn't think that he put up the signs but he did put the prices on them (Tr. 148); at the trial he testified that either he or his help put up the sign (Tr. 144).

Gardner testified that the changes in the deposition were his own and that he didn't discuss the changes with his attorney and he told him what to write (Tr. 129-131). This testimony is set out in full as follows:

“Q. Now, when did you make these changes; both these two that you talked about in your deposition?

A. Well, it was after this.

Q. Well, where? Where did you make the changes; at what place?

A. You mean where—

Q. Let me withdraw that.

A. I don't know what you mean about where or when.

Q. Did you receive that deposition from the reporter that took it here in Helena?

A. Did I receive that from him?

Q. Yes.

A. No.

Q. Did you go to the notary's office, Mrs. Gwen Blacker, to pick that deposition up when it was completed to read it?

A. I don't think I ever went anywhere to pick it up.

Q. I don't hear you.

A. I said I don't think I ever went anywhere to pick up anything like this.

MR. PICOTTE: Speak up a little louder, Curt.

THE WITNESS: I don't remember picking anything up. Went and got—went to my lawyer.

BY MR. SKEDD:

Q. You went to your lawyer's office, and that is where you went over the deposition?

A. I went up and told him to make the changes. After I got to thinking about it I knew they was wrong.

Q. And those are your own changes?

A. Yes.

Q. Did you discuss the changes with your attorney?

A. Didn't discuss 'em, no. I told him what to write.

Q. These are you words, then in the changes?

A. Yes.

Q. And the reasons therefor?

A. Yes.

Q. And did you write them in handwriting?

A. No.

Q. Did you dictate them on a dictating machine?

A. I don't know—

Q. Sir?

A. Well, I don't remember whether there was anybody there or not.

Q. Did you dictate them to a stenographer?

A. Just Gene and I was there, I'm sure. Just Gene and I. Just Gene.

Q. These answers are typed out, are they not, these charges?

A. Sure.

Q. They are not in your handwriting?

A. Huh? No. of course not. Not this. (Indicates)

Q. That is not your terminology?

A. Well, it is too.

Q. You mean when you changed that—

A. Well—

Q. —that deposition you said, on page—

change one, the one we referred to: Strike the answer and substitute, quote, if you mean the retail—

A. I may not have said exact words like that.”
The testimony of Mr. Gardner illustrates the control and domination that Phillips and Bridges possessed over the “Operators”.

Evidence of Conspiracy as a Whole

It is unlikely in a case such as this that one of the participants will suddenly jump up and confess as sometimes occurs in the “Perry Mason” television shows.

The character and effect of conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *Lessig v. Tidewater Oil Co.*, 327 F.2d 459.

The essential agreement, combination or conspiracy might be implied from the course of dealing or other circumstances. *Frey and Son v. Cudahy Packing Co.*, 256 U.S. 208, 210, 41 S.Ct. 451, 65 L.Ed. 892 and it is elementary that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, *Eastern States Retail Lumber Ass’n. v. United States*, 234 U.S. 600, 612, 34 S.Ct. 951, 954, 58 L.Ed. 1490.

It appears that from the whole of the evidence Phillips was not only a participant in the conspiracy but actually was its founder, and Phillips is not a stranger to this type of litigation.

The case of *Ingram v. Phillips Petroleum Co., et al*, 252 F. Supp. 674 (1966), considered a conspiracy count

which alleged that the acts complained of were pursuant to a combination and conspiracy in restraint of trade, the object and purpose of which was to secure a monopoly in the lines of trade and commerce involved and that the conspiracy had been accomplished by agreements and understandings among the Defendants to fix the prices of gasoline in the area involved, and the Court stated, at page 678, as follows:

“[4-8] We must conclude from a study of the evidentiary material presented that the evidence in support of conspiracy is less than strong. The statements in the deposition of D. L. Ingram to the effect that he suspect concerted action because price reductions occurred about the same time is the sum total of plaintiffs’ showing. As defendants point out, similarity of business practice, or parallelism, is not invariably indicative of a conspiracy to monopolize in restraint of trade. See *Theatre Enterprises, Inc. v. Paramount Film Distribution Corp.*, 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954). However, such behavior may, even without previous agreement, be found to violate the antitrust laws. See *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946). Nor need there be simultaneous action or agreement to constitute an unlawful conspiracy. See *William Goldman Theatres v. Loew’s Inc.*, 3rd Cir. 1945, 150 F.2d 738. There need be no express agreement, written or otherwise, and intent to conspire is not necessary if unlawful restraint of trade results from improper conduct. See *Esco Corp. v. United States*, 9th Cir. 1965, 340 F.2d 1000 . . .”

In *United States v. Ward Baking Co.*, 224 F. Supp. 66 (1963) at page 69, the Court stated:

D. Participation

[6, 7] “A person does not become liable as a conspirator unless he knows of the existence of the conspiracy, agrees to become a party, and with that knowledge commits some act in furtherance thereof. * * * This knowledge and participation may be inferred from the circumstances, acts and conduct of the parties.” *United States v. Kensil*, 195 F. Supp. 115, 119 (E.D. Pa. 1961), quoting *Jones v. United States*, 251 F.2d 288, 293 (10th Cir. 1958). “Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a ‘development and a collocation of circumstances.’” *Glasser v. United States* 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1941), rehearing den. 315 U.S. 827, (Footnote 3) 62 S.Ct. 629, 86 L.Ed. 1222.

E. Evidence of Conspiracy

[8] As noted above, “it is not necessary to show any formal agreement among the conspirators. * * * The common plan can be and must often be established by what people do rather than by what they say.” *United States v. Georgia*, 210 F.2d 45, 48 (3rd Cir. 1945). See, also, *Interstate Circuit v. United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939). “Criminal plottings are spawned in secrecy, and the very nature of conspiracy often precludes proof by direct evidence. For this reason it is an axiomatic principle of law that a conspiracy charge may be sustained on circumstantial evidence alone. * * * Overt acts done in apparent pursuance of a common plan serve as evidence to demonstrate the existence of a conspiracy.” *United States v. Migliorino*, 238 F.2d 7, 9 (3rd Cir. 1956).

Footnote No. 3

Participation in a criminal conspiracy may be shown by circumstantial, as well as by direct evidence. *Delli Paoli v. United States*, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed. 2d 278 (1957); *United States*

v. Monticello, 264 F.2d 47 (3rd Cir. 1959)."

D. *Attempt to Monopolize*

The testimony shows that Phillips, and the other major oil companies, controlled eighty per cent (80%) of the gasoline market in the State of Montana and in the Helena area (Tr. 27); that the price lowering was aimed at the "Independents", particularly Gasomat (Tr. 109) and others, and that the gas prices were lowered to such an extent that the Appellant, an "Independent", was forced out of business (Tr. 43, 44). Thus, the attempt to monopolize as prohibited by the Sherman Act.

In *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 3 L.Ed.2d 741, 79 S.Ct. 705, the Court held that a complaint which alleges a restraint in violation of § 1 of the Sherman Act constitutes a per se injury to the public, and said at page 708:

"We think Klor's allegations clearly show one type of trade restraint and public harm the Sherman Act forbids, and that defendants' affidavits provide no defense to the charges. Section 1 of the Sherman Act makes illegal any contract, combination or conspiracy in restraint of trade, and § 2 forbids any person or combination from monopolizing or attempting to monopolize any part of interstate commerce. In the landmark case of *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, this Court read § 1 to prohibit those classes of contracts or acts which the common law had deemed to be undue restraints of trade and those which new times and economic conditions would make unreasonable. *Id.*, at pages 59-60, 31 S.Ct. at pages 515-516. The Court construed § 2 as making "the prohib-

itions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the 1st section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof * * *." Id., at page 61, 31 S.Ct. at page 516. The effect of both sections, the Court said, was to adopt the common-law proscription of all "contracts or acts which it was considered had a monopolistic tendency * * *" and which interfered with the "natural flow" of an appreciable amount of interstate commerce. Id., at pages 57, 61, 31 S. Ct. at page 514; *Eastern States Retail Lumber Dealers' Ass'n. v. United States*, 234 U.S. 600, 609, 34 S.Ct. 951, 953, 58 L.Ed. 1490. The Court recognized that there were some agreements whose validity depended on the surrounding circumstances. It emphasized, however, that there were classes of restraints which from their "nature or character" were unduly restrictive, and hence forbidden by both the common law and the statute. 221 U.S. at pages 58, 65, 31 S.Ct. at page 515. As to these classes of restraints, the Court noted, Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred. Id., at pages 63-68, 31 S.Ct. at pages 517-518-519.

And at page 710 said:

"Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations "which 'tend to create a monopoly,'" whether "the tendency is a creeping one" or "one that proceeds at full gallop." *International Salt Co. v. United States*, 332 U.S. 392, 396, 68 S.Ct. 12, 15, 92 L.Ed. 20."

E. Damages

The testimony of John Vance with regard damages

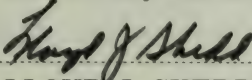
reveal that the Appellant was run out of business and that the value of its business destroyed amounted to the sum of \$60,000.00 (Tr. 46).

The Appellant was entitled to be fairly compensated for all damages, if any, to his business and property, proximately caused by the defendants continued violation of the Federal antitrust laws and such includes damage to the Appellant's business and property. The fact that the precise amount of Appellant's damage may be difficult to ascertain should not affect the Appellant's recovery, particularly if the defendants' wrongdoings have caused the difficulty in determining the precise amount. *Bigelow v. RKO Pictures*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946); *Pennington v. United Mine Workers*, 325 F.2d 804 (6th Cir. 1963), cert. granted 377 U. S. 929, 84 S.Ct. 1333, 12 L.Ed. 2d 294 (1964); *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709 (9th Cir. 1959).

III.
CONCLUSION

It is submitted that the Court should have allowed the case to go to the jury to decide from the evidence, both direct and circumstantial, if the Appellees conspired in violation of the Sherman Act and if so the amount of damages due Appellant.

Respectfully submitted,



LLOYD J. SKEDD

Attorney for Appellant

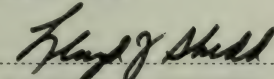
Address: Third Floor

Horsky Block

Helena, Montana

CERTIFICATE

I certify then, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.



LLOYD J. SKEDD

Attorney for Appellant

Third Floor

Horsky Block

Helena, Montana

CERTIFICATE OF SERVICE BY MAILING

I, Lloyd J. Skedd, Attorney for Appellant, hereby certify that the foregoing Brief of Appellant, was duly served on each of the following:

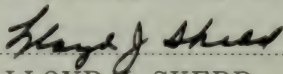
Mr. Kendrick Smith, Esq.
c/o Corette, Smith, Dean & Robishon
Professional Building
Butte, Montana

Attorneys for Appellee, Phillips Petroleum Co.

Mr. Gene Picotte, Esq.
c/o Loble, Picotte & Fredricks,
833 North Main Street
Helena, Montana

Attorneys for Appellees, W. J. Bridges, Donald W. Cullen, Curtice Gardner and James H. Norwood.

by mailing three (3) copies to each, at their last known address as set forth above, this ~~19~~¹⁷ day of July, 1967.



LLOYD J. SKEDD

Attorney for Appellant

Third Floor

Horsky Block

Helena, Montana

APPENDIX "A"
CURTICE GARDNER

was called as a witness and, have first been duly sworn, was examined and testified as follows:

CROSS-EXAMINATION

BY MR. SKEDD:

Q. State your name, please?

A. Curtice Gardner.

Q. And where do you live, Mr. Gardner?

A. 1204 Hollins.

Q. And what do you do for a living?

A. Operate a gas station.

Q. In Helena?

A. Yep.

Q. You do now?

A. Yeah.

Q. What gasoline station do you operate?

A. Now?

Q. Yes.

A. Chevron.

Q. And where is that located?

A. 1023 North Main.

Q. In the year of 1954 were you employed in Helena?

A. 1954?

Q. Sixty-four. Excuse me.

A. 1964?

Q. Uh-huh.

A. Yes.

Q. Where were you employed?

A. Myself.

Q. And where at?

A. Oh. 1133-11th.

Q. And what was the nature of your employment or business?

A. Service station.

Q. What kind of service station?

A. Phillips.

Q. And were you leasing the station?
A. Was I leasing it?
Q. Yes.
A. Yes.
Q. And who were you leasing the station from?
A. Well, I leased it from Jim Bridges.
Q. Did you have a written lease?
A. No.
Q. What kind of a lease was it? What were the terms of the lease?
A. Just a verbal agreement, lease.
Q. And what were the terms of it? Do you understand me?
A. You mean what—how much?
Q. Did you pay rental?
A. Yes.
Q. And how did you pay the rental?
A. So much gallonage. By gallonage.
Q. And how much a gallon?
A. I believe it was a cent a gallon. Cent or so.
Q. You were selling Phillips Petroleum Gasoline, is that right?
Yes.
Q. Did you have Phillips Petroleum signs on your station?
A. Yeah, they had Phillips signs there. Shield.
Q. Were the signs put on before you got there?
A. Yes.
Q. When did you take over that particular station?
A. I believe it was '60 or '61.
Q. Did you have anybody working with you in the station?
A. Yes.
Q. Would you please describe the color of the station, painting on the building?
A. It's red and white.
Q. Is that a uniform Phillips 66 painting?
A. Well, they are—yes, I guess so. They are all painted the same color.

Q. They are all painted the same, are they not?

A. Yes.

Q. Did you do the repair work on the building, on the station?

A. No.

Q. And who performed that work?

(No response)

Q. First, did you have any repairs on the station on '60 through '64?

A. Well, just the paint is all. I don't think there was ever anything else that I know, remember.

Q. Who painted it?

A. Well, that I don't know. Just painters is all I knew. Who painted it—just the painters is all I knew.

Q. Did Phillips 66 paint it, Phillips Petroleum Company?

A. You mean their painters?

Q. Yes.

A. I don't know.

Q. Do you know who paid for it?

A. I don't know that either.

Q. Did Phillips Petroleum Company have a set of rules and regulations for operating the gas station?

MR. SMITH: Objected to as no proper foundation.

THE COURT: Overruled.

THE WITNESS: Did they have any set rules?

MR. SKEDD: Yes.

THE WITNESS: As far as I know just kept the station clean, kept operated, conditions.

BY MR. SKEDD:

Q. Did they have rules and regulations to guide you in operating the station?

A. Well, I don't quite get what you're driving at there.

Q. Well, were there any regulations that you had to follow in operating the gas station?

(No response)

MR. PICOTTE: Individual defendants object to this question and ask a continuing objection to the whole line of questioning on the ground it is irrelevant, immaterial, and incompetent to prove anything in this action. And on the further ground that the question is ambiguous and indefinite. The meaning of the phrase rules and regulations being wholly undecipherable in this action.

THE COURT: Overruled.

BY MR. SKEDD:

Q. You may answer.

A. Well, as far as I knew wasn't any set rules outside of just keeping your end of it up, my end of it up.

Q. That is what we are talking about, Mr. Gardner, your end, your end of the business.

A. Yes.

Q. Did you have regulations with regard to forwarding credit cards?

MR. PICOTTE: Object to the question unless some sort of regulations are specified in the question. It is unpredictable.

THE COURT: That is sustained.

You might rephrase it.

MR. SKEDD: All right.

Q. Did you have a directive or a set procedure for forwarding claims to Phillips Petroleum Company? Any kind of claims?

A. You mean to turn claims into them?

Q. Yes.

A. That would be—I never did turn any claims into Phillips Petroleum Company.

Q. Did you contribute or pay any monies for the advertising in the papers—

A. No.

Q. —of Phillips Petroleum Company?

A. No.

Q. Did they have a regulation or rule for maintaining rest rooms on the station property?

A. I don't think there is any set rule in there. Of course everybody likes to have things clean.

As far as I know wasn't any set rule. Let it go to suit yourself.

Q. Did Mr. Davidson—was there a Mr. Davidson connected with the Phillips Petroleum Company during this period of time?

A. Davidson—

Q. Pardon me; I withdraw that.
Don Hamilton?

A. Yeah, he was—yes, he was there.

Q. He was some kind of a representative of Phillips Petroleum Company, was he not?

A. Yes, far as I know.

Q. Did he visit your property out there frequently?

A. Did he visit?

Q. Yes.

A. Oh, I'd say he come around probably once a month, maybe.

Q. Did he inspect your property when he came around, for safety?

A. Well, yes, I imagine. He just come in and visit, mostly.

MR. PICOTTE: Move the witness' imagination be stricken.

THE COURT: Overrled.

BY MR. SKEDD:

Q. Now, who set the prices for the gasoline to be sold at your station?

A. I did.

Q. Did you have your deposition taken on October the 24th, 1966, here in Helena?

A. I don't know what day it was.

Q. Handing you—if I may approach the witness, Your Honor—handing you what is filed in this court, filed November 14, 1966, the deposition of Curtice Gardner, taken October the 24th, 1966; and on page five thereof please read line twenty-four through line thirty-two on that page.

(Pause while the witness looks at papers).

Q. Line one through line four on page six.

(Pause while the witness looks at papers).

A. Well, I think when I made this thing I misunderstood the question, I want it—

Q. Mr. Gardner, speak up, will you, please, so that everyone may hear you.

A. Well, as I say, when we did this here, why I just come from work down there and—

MR. PICOTTE: Speak louder, Curt, please.

THE WITNESS:—and I couldn't exactly think what was supposed to be going on here—

BY MR. SKEDD:

Q. Is that—

A. —at the time, but that isn't right.

Q. Is that what you said at the deposition?

A. Well, if you got it down here I suppose that is what I said. But that isn't exactly the way it should have been.

Q. Now, one minute. Did you make a change to that deposition later? Referring (indicates to the first page of changes, changes made by the witness in the foregoing deposition; page five, line twenty-nine.

(Pause while witness looks at papers).

A. Yes, I made a change.

Q. Now, who set the prices at the gas—at your gasoline station where gasoline is sold there?

A. I did.

Q. Huh?

A. I did.

Q. Now, will you read line twenty-four, page five, through the end of the page?

(Pause while witness looks at papers).

Q. Read it out loud, please. Out loud.

A. You want me to read it out loud?

Q. Yes; loud, please.

A. (Reading) I do not think so, nobody ever said anything—well, we just—and I got—you got a mark there, I don't know, struck out—I don't know as we did say we set them, they had certain prices on the stuff, and maybe you call that price setting.

Q. Setting a price?

A. Setting a price.

Q. All right.

A. Price setting.

And you have a question here: Who set the prices?

Q. Answer?

A. Answer: I suppose Phillips Petroleum, I suppose.

Q. Next question.

A. Didn't set them.

Q. Would you say that again?

A. No.

Q. I didn't hear you.

A. You didn't set them; I said no.

Q. Next.

A. Which is wrong. I don't know what you were driving at there.

Q. Obviously. Let's go to the next question.

A. (Reading) You just operated at the station at the price they told you to operate at, is that correct? I said yes.

Q. Next question.

A. And that was all during your lease?

Q. Answer.

A. Yes, Sure.

Q. Now, your changes—

A. Of course—

Q. Now, your changes; refer to the back again—

A. Uh-huh.

Q. —your changes in that testimony.

A. You got me mixed up there.

Q. Now if you will read the change?

A. Yeah, I struck—got strike the answer. But here is the change over here (indicates) isn't it?

Q. Read the change there where it says change.

A. Strike the answer and substitute if you mean the retail price at which gasoline was sold at my station, I set the price.

Q. Now the reason therefor?

A. The reason therefor: I misunderstood the

question, and the change made here is the truth, sure.

Q. Hold that if you will.

Now, when you established these prices for your gasoline at your station did you place it on the pump, the sign?

A. There was no sign on the pump.

Q. Did you post the advertisement that would state the price of gas on the pump?

A. The price that is on the pump?

Q. Yes.

A. They have a little square there where the price is set.

Q. Yes. And who sets the price?

A. I did.

Q. Did Phillips Petroleum or Bridges tell you what to sell it for?

A. No.

Q. They tell you what to put on the pump?

A. No.

Q. Your deposition, the same one, on page eight, line seven; read line seven, please, to yourself, through twelve. Seven through twelve.

A. Want me to read it out loud?

Q. No, read it to yourself first.

THE COURT: Page eight you are referring to?

THE WITNESS: U-huh.

THE COURT: Page eight?

MR. SKEDD: Page eight, Your Honor, line—

MR. PICOTTE: Seven.

MR. SKEDD:—seven through twelve.

(Pause while witness looks at papers)

BY MR. SKEDD:

Q. Have you finished reading it?

A. Yes.

Q. Now I ask you: Did they tell you the price to put on the pumps?

A. No, they didn't tell me exactly the price to put on the pump.

Q. Did they tell you the price that you were going to sell it for?

A. No.

Q. Now will you please read, starting on line eight through—line seven through line twelve of your deposition?

A. Okay.

Q. Read it out loud, please.

A. Well, let's see, it says: Whether set by Phillips, Jim Bridges or who it was set by, I don't know. It was just like it is right now. They tell you to put so much on the pump and that is what it goes.

Q. Next question.

A. They tell you the price you are going to sell it for? And here you got marked a yes.

Q. Answer?

A. Yes.

Q. Now, you changed that, did you not?

A. Yes, I did. I changed that one, too.

Q. The first page of changes on line fifteen, then; will you read the change, please?

A. It says: Strike the entire answer and substitute the following: At all times I raised or lowered the prices of gasoline at my station to meet competition. If the other Phillips stations went down in price, I had to go down to meet the competition, and I always followed the policy that I figured I didn't have any choice in this matter. I had to meet the prices at other stations in the city, and particularly the other Phillips stations, in order to survive in business, and when Jim Bridges or anyone else went down in price, I went down automatically to meet their price, but they were not the ones who changed my price. I was the one who made the decision on that, but my policy was simply to keep track of their prices, in order to meet them. In this sense, but in this sense only, Jim Bridges or the other dealers, when they went down in price, fixed my price, but they never told me I had to go down, nor did I ever make any agreement with them. I just—

Q. Them about—

A. —I just automatically went down when I found out they went down. That was my own personal business policy, and nothing else.

Q. Now would you read to the right, the reason therefor?

A. What I meant to convey by my answer to this question was that in a sense, Jim Bridges fixed the price of gasoline at my station, because when I lowered his price—

Q. No; because when he lowered his price.

A. —because when he lowered his price, he forced me to lower mine for competitive reasons. But he never indicted me to that, I had to lower my price, nor did he ever make the decision as far as my station was concerned. The competitive situation made the decision for me, as far as I was concerned. There was never any agreement between myself and Bridges concerning the retail prices of gasoline at my station, or anyone else.

Q. Now, when did you make these changes; both these two that you talked about in your deposition?

A. Well, it was after this.

Q. Well, where? Where did you make the changes; at what place?

A. You mean where—

Q. Let me withdraw that.

A. I don't know what you mean about where or when.

Q. Did you receive that deposition from the reporter that took it here in Helena.

A. Did I receive that from him?

Q. Yes.

A. No.

Q. Did you go to the notary's office, Mrs. Gwen Blacker, to pick that deposition up when it was completed to read it?

A. I don't think I ever went anywhere to pick it up.

Q. I don't hear you.

A. I said I don't think I ever went anywhere to pick up anything like this.

MR. PICOTTE: Speak up a little louder, Curt.

THE WITNESS: I don't remember picking anything up. Went and got—went to my lawyer.

BY MR. SKEDD:

Q. You went to your lawyer's office, and that is where you went over the deposition?

A. I went up and told him to make the changes. After I got to thinking about it I knew they was wrong.

Q. And those are your own changes?

A. Yes.

Q. Did you discuss the changes with your attorney?

A. Didn't discuss 'em, no. I told him what to write.

Q. These are your words, then in the changes?

A. Yes.

Q. And the reasons therefor?

A. Yes.

Q. And did you write them in handwriting?

A. No.

Q. Did you dictate them on a dictating machine?

A. I don't know—

Q. Sir?

A. Well, I don't remember whether there was anybody there or not.

Q. Did you dictate them to a stenographer?

A. Just Gene and I was there, I'm sure. Just Gene and I. Just Gene.

Q. These answers are typed out, are they not, these changes?

A. Sure.

Q. They are not in your handwriting?

A. Huh? No. of course not. Not this. (Indicates)

Q. That is not your terminology?

A. Well, it is too.

Q. You mean when you changed that—

A. Well—

Q.—that deposition you said, on page—change one, the one we referred to: Strike the answer and substitute, quote, if you mean the retail—

A. I may not have said exact words like that.

Q. Now, Mr. Gardner, did you have a meeting with Mr. Bridges and the other Phillips dealers prior to the lowering of gasoline in March of 1964?

A. Did I have a meeting with them?

Q. Yes.

A. We had several meetings.

Q. And where did you meet?

A. Oh, heavens, far as—well, we just more or less get together in certain—my station, maybe. He was up there.

Q. 1901 North Main Street?

A. No.

Q. You didn't meet at 1901 North Main Street just prior to this lowering of the gas prices?

A. We were down there one night, yeah, but I don't think there was ever—

Q. And you discussed the price changes, did you not?

A. Well, we probably did.

Q. Lowering the prices?

A. Well, yeah, there was something said about lowering the prices all right.

Q. At that meeting did you discuss signs?

A. No.

Q. Did you discuss a figure of thirty-three point nine cents a gallon?

A. We—yeah, we probably discussed it all right.

Q. Did you discuss the Gasomat that was selling independent gasoline for twenty-nine point something?

A. Well, I imagine that was brought in.

Q. Did you discuss the other independent gasoline dealers in the city?

A. Well, that I don't know. Gee whiz, it has

been a long time ago. Probably had everybody in—

Q. Yes.

Did you have a discussion with regard to volume?

A. No.

Q. Did you set a date when you would lower the prices together?

A. No, sir, that was never—

Q. The exact date was not set, is that right?

A. We never discussed about any exact date, no. Never did discuss them, whether he was going to—

Q. Did Mr. Bridges discuss his trip to Spokane with you at this meeting?

A. No.

Q. Did you have other meetings with Mr. Bridges other than at 1901 North Main Street in the month of March, 1964?

A. Not that I know of, as I can remember now.

Q. Did you meet with him at the Zip In and Zip Out?

A. Well, he used to call us up and have us come down for breakfast once in a while.

Q. And particularly in the month of March, 1964?

A. No.

Q. And at those meetings at the Zip In and Out did you discuss prices?

A. No.

Q. What did you discuss at those meetings?

A. Well, just more or less get together, see how everybody was doing was all. Wasn't nothing on price fixing or nothing like that.

Q. Did Mr. Bridges inspect your gasoline station during this period of time in March of 1964?

A. He was up there several times.

Q. Did he inspect it for conditions of health?

A. I don't think so.

Q. Did he make any recommendations, or did

he tell you how your merchandising should be handled?

A. No.

Q. Skipping somewhat—you were still in the gasoline business in June of 1964, were you not?

A. Yeah—March?

Q. Yes.

A. Yes.

Q. March through June?

(Witness nods head)

Q. How long were you in that Phillips station, Curt?

A. Five years.

Q. That would have been until 1965 sometime?

A. Yeah, that's right.

Q. When did you leave the Phillips station?

A. Last of January '65.

Q. Then you went through the price war that occurred after March the 28th, 1964?

A. Yeah.

Q. And all of the major oil companies reduced their price after that, did they not?

A. After '64.

Q. After March of 1964 when Phillips come down in their prices?

A. Yes.

MR. SMITH: I am going to object to the assuming. Will you read the question back, please.

(Reporter reads from record commencing on line 3 of this page and ending on line 8)

THE COURT: Sustained.

MR. SMITH: I move the answer be stricken.

THE COURT: The answer may be stricken.

MR. SMITH: I object—

THE COURT: That portion of the answer may be stricken.

MR. SMITH: Yes.

I object to the question on the ground that it assumes a fact which is not in issue; I mean, has not been proven that Phillips did in fact reduce its prices.

MR. PICOTTE: Individual defendants join in the objection.

THE COURT: Well, it is already ruled on.

BY MR. SKEDD:

Q. Did Mr. Bridges reduce his prices in March of 1964 on regular gasoline in the City of Helena?

MR. PICOTTE: Objected to unless it is specified this is wholesale or retail prices being referred to.

THE WITNESS: Well, I don't remember exact dates.

MR. PICOTTE: Just a moment, please.

THE COURT: Overruled.

MR. PICOTTE: I have an objection.

BY MR. SKEDD:

Q. You may answer.

A. I say I don't remember the exact dates on that.

Q. Well, do you recall the date, the month that the gasoline prices were lowered as you said? Do you remember the month?

A. I don't even remember—well, you got it there. It was in March, last of March. Twenty-eighth.

Q. Of nineteen—

A. But you got it there.

Q. March of 1964?

A. Well, that what you got? You got it down there.

Q. Was Mr. Bridges running a station that sold Phillips Petroleum products that was painted like your in March of 1964?

A. Well, I don't know whether he was running it or leased it out?

Q. Did he have a station here in Helena at that time?

A. That I don't know, whether he owned it or somebody else owned it.

Q. Was Mr. Bridges in the retail gasoline business in Helena in March of 1964?

A. Well, that again I don't—As I say, I don't

know whether he leased it out, whether he was in the retail or not. He had the bulk plant, I do know that.

Q. You don't know whether he was running a gas station in Helena?

A. I don't know whether he run it or leased it.

Q. Well, I understood—excuse me. You said that Mr. Bridges lowered the price of gasoline in his station; am I in error in that?

A. Well, as I say, I don't know what his business was. I never paid no attention to his.

Q. Didn't you lower your prices after Mr. Bridges lowered his prices?

A. Yes.

Q. Well, then, Mr. Bridges was running a station, I take it?

A. Well, he must have hired—he couldn't run two, three places at once.

MR. PICOTTE: Move the witness' answer be stricken as not responsive.

THE COURT: Overruled.

BY MR. SKEDD:

Q. Now, there was another Phillips 66 station here; there were four of them operating during March of 1964, were there not?

A. Yeah.

Q. And they all lowered their prices to the same figure late in the month of March, 1964, did they not?

A. Well, that I can't—I can't say whether they all ever did or not.

Q. Did you attend a meeting in the Steamboat Block late in March of 1964, of retail gasoline dealers?

A. No, I don't think I was there. Don't remember being there.

Q. Did Phillips Petroleum Company ever pay you a subsidy for keeping your price of gasoline low?

A. No.

Q. Did your supplier of gasoline during the

period of 1964 at any time give you a subsidy for keeping your price of gasoline low?

A. In '64?

Q. In 1964.

A. Well, it was later, not—

Q. Was it in 1964?

A. Yes, we got subsidy in '64.

Q. And who did you get the subsidy from?

A. Came from Jim Bridges.

Q. In your discussions at these Zip In and Zip Out or at 1901 North Main, did you discuss a subsidy at all, if gasoline prices were lowered?

A. No.

Q. Was the subsidy paid to you by Mr. Bridges or by Phillips Petroleum Company?

A. By Mr. Bridges.

Q. Do you know who originated it; who started the subsidy for you?

A. No.

Q. Do you have any idea where the subsidy came from?

MR. PICOTTE: Objected to as calling for speculation by the witness.

THE COURT: Sustained:

BY MR. SKEDD:

Q. All right, turn to page ten of the deposition, line twenty-seven. Read that to yourself, please. (Pause while witness looks at papers).

Q. Have you read that?

A. Yes.

Q. Now do you know where the subsidy originally came from?

A. No, I couldn't say as I know exactly where it come from.

Q. Read line twenty-seven through thirty-one. (Pause while witness looks at papers).

Q. Read it out loud, please.

A. Oh. (Reading) Was that subsidy awarded to you prior to the time that the prices came down in March of '64; I put the answer: Yes, it auto-

matically come through, originally come from Phillips Company, I suppose. That is all.

MR. PICOTTE: We move the witness' supposition be stricken and the jury instructed to disregard it as speculation, Your Honor. He hasn't already testified here where it originated, anything of that sort.

THE COURT: Overruled.

BY MR. SKEDD:

Q. Curtice, with reference to the advertising that you had on your station in March of 1964, what kind of signs did you have advertising the prices for your gasoline on your station prior to the time the prices were lowered?

A. We had none.

Q. Didn't have any?

A. Just what was on the pumps, which they all are, the price.

Q. But you didn't have any other signs anywhere else stating the price of gasoline?

A. No.

Q. It was just a little sign that you see on the pump when you read it?

A. Right.

Q. Says so much a gallon on there, is that right?

A. That's right.

Q. It is in diameter—pardon me. Could you describe the size of it?

A. Oh, I imagine they are about probably two inch letters, inch and a half.

Q. Two inch letters?

A. Inch and a half, maybe.

MR. PICOTTE: I'm sorry, what time is being referred to here?

MR. SKEDD: Prior to the lowering of gasoline.

MR. PICOTTE: Thank you.

BY MR. SKEDD:

Q. They were on the pumps?

A. Well, they are on little wheels about so big around. (Indicates).

Q. But on the pumps that you get the gasoline?

A. On the side.

Q. On the side of the pumps?

A. Inside.

Q. On the inside under the glass?

A. Uh-huh.

Q. And there is a meter that ticks off how much gasoline you are putting in and computes the price automatically, isn't that right?

A. Yes.

Q. And that is the only place you had signs for the price of gasoline at that time on your stations?

A. Yes.

Q. Now in March of 1964, and when these prices were lowered, what kind of a sign did you have, if any?

A. Well, we had these big A board signs when the gas war started.

Q. How big were those signs?

A. Oh, I suppose four by six.

Q. Were they as big as this—might I use this (Indicates) as an illustration, Your Honor?

Was the sign that was made then and placed on your property as big as that board? (Indicates).

A. Yeah, I'd say about that.

Q. Would that be about three—two and a half feet by two and a half feet?

A. Pretty close.

Q. And what wording was placed on these signs?

A. Today's gasoline price.

Q. It says today's gasoline price?

A. Uh-huh.

Q. And then what did it have, a space or something where cards were put in?

A. Yeah, they had a blank, and regular gas.

Q. Did it have a price for premium gas?

A. Yes.

Q. But today's price is on top?

A. Well, I don't know; could have been. I forget now. That has been quite a while ago.

- Q. Yes.
- A. Whether it was on top or on the bottom—
- Q. Did you order that sign that is as large as that board that was put on your property after the gas price was lowered?
- A. Did I order it?
- Q. Did you order it from anyone?
- A. Well, I wouldn't really say that I ordered the sign. It come from the bulk station, I know that.
- Q. Who did it come from?
- A. The bulk station.
- Q. And did you have anything to do with designating what would be placed on the sign?
- A. Yes, I put them on there myself.
- Q. The wording, I mean, of today's prices; did you have anything to do with preparing that?
- A. No.
- Q. Do you know where the sign was made?
- A. No.
- Q. Do you know who made the sign?
- A. No.
- Q. Where did you get the sign?
- A. I said it come from the bulk plant.
- Q. And who put the sign up on your property?
- A. Well, it was left there. We put it up.
- Q. Who put the sign up?
- A. Well, I imagine either I or else my help.
- Q. You didn't put it up? You didn't put the sign up?
- A. Well, I can't—heavens, I don't—you mean did I go out there and put the thing up and stand it up?
- Q. That's what I mean.
- A. That is what you mean?
- Q. Uh-huh.
- A. I'd say I had a hand in it. One man couldn't handle it alone.
- Q. Look at your deposition on page twenty-four on through the rest of page eight.

MR. PICOTTE: The deposition doesn't have twenty-four pages.

MR. SKEDD: Pardon me. Page eight, line twenty-four. Did I say—

MR. PICOTTE: Yes, you said page twenty-four.

MR. SKEDD: Line twenty-four, page eight.

BY MR. SKEDD:

Q. Start on line twenty, be better.

(Pause while witness looks at papers).

A. Want me to read that out loud?

Q. Yes.

A. Line twenty or twenty-four?

Q. Start with line twenty, if you please.

A. Says: Was anyone present? Yes, I imagine.

I had—

Q. Wait a minute.

A. —I had help.

Q. Just a minute.

A. Wait a minute; that's page nine.

Q. Page eight, pardon me.

A. Here.

Q. You got eight there?

A. Yeah.

(Pause while witness looks at papers).

A. I don't know—I don't remember anything like that. That is the reason I said let me break it down. Talking about it here. I will withdraw that question he says.

THE COURT: Do not comment—just answer questions that are asked of you, Mr. Gardner.

MR. SKEDD: Maybe we haven't got the same book here.

THE WITNESS: Right here. (Indicates) You withdrew it.

BY MR. SKEDD:

Q. Yes; go ahead, read the whole thing. Start from line twenty and read it through line thirty-two.

A. Question is: Well, let me break it down. I will withdraw that question. Did you, during March of 1964, have large signs setting—

Q. Stating.

A. —the price of gasoline? I said yes.

Were those signs changed during the month of '65? That is —

MR. PICOTTE: Object to the question as unintelligible.

BY MR. SKEDD:

Q. Answer?

THE COURT: Overruled.

THE WITNESS: (Reading) That is when all—it all started, isn't it, in March?

BY MR. SKEDD:

Q. Would you read that again, please?

A. Something wrong here; don't make sense.

Q. Would you read it out loud, please, so I could hear it?

A. The twenty-fifth line?

Q. Yes.

A. (Reading) That is when it all started, isn't it, in March? Is that when it all started?

Q. Question?

A. (Reading) Yes, if you can recall—if you can recall—that is twenty-seven.

Q. All right; go ahead, all through the page.

A. Oh. (Reading) Put a big—answer: Put a big sign up, that's all I know.

Q. Question?

A. (Reading) Who put the sign up?

I guess you have to say Jim Bridges. His helper put it up as far as I could say. I don't— let's see—I know I didn't.

You didn't put it up, nor your employees?

Q. Or your employees?

A. Yeah

Q. Answer, next page?

MR. PICOTTE: Please try to speak louder, Curt.

THE WITNESS: All right.

Then I got: That is true.

BY MR. SKEDD:

Q. Now it you will turn to the changes, page

two of the changes, page—wait a minute, maybe I got the wrong one. Is that sixteen? (Pause while Mr. Skedd looks through papers).

No, that hasn't been changed. No, that hasn't been changed; that is right.

Excuse me just one minute, Your Honor. (Pause while Messrs. Skedd, Vance and Picotte confer off record).

BY MR. SKEDD:

Q. Turning to the third page—and out of order there—is onther change; that is in the third page, it says page eight, line thirty-one; that is after these other pages we come back to line—page eight, line thirty-one, that is what we are talking about, what you just read. Now will you read that, please, the change?

A. Yeah. It says: I know—

Q. Starts strike.

A. Strike. (Reading) Strike I know I didn't and substitute: I don't think I put up the sign, but I did put the figures for the prices on the sign after the sign itself had been put up. In other words, there were removable numbers, so that the prices advertised on this sign could be changed, and I put those on the sign at all times, and I made the decision as to what the price shown on the sign from day-to-day by me.

MR. PICOTTE: Would be.

BY MR. SKEDD:

Q. Off on the right, reasons therefor?

A. (Reading) I refreshed my memory and this certifies and makes my answer more accurate.

Q. Clarifies?

A. Yes.

Q. Did you make the change yourself?

A. Yes.

Q. And you made it after you had made these other changes in the order that it appears?

A. You mean this? (Indicates).

Q. Yes. You went back and made that one after you made the other changes?

A. Now, wait—I don't follow you there.

Q. Where did you make that change? Was that made on the same day that you made the other changes to this deposition?

A. Yes. Yes.

Q. Page three was made the same day that page one and two were of the changes?

A. After I looked this thing over here to see—

Q. After you read it over?

A. Yes.

Q. Did anyone suggest changes to you?

A. No.

Q. When it appeared in writing you had refreshed your memory then, as I understand it, and now you, or your employees may have put the sign up?

A. What's this?

Q. Do I understand your testimony now that either you or your employees may have put the sign up on the day that the prices were changed?

A. Put the —we changed it—the prices.

MR. SKEDD: We have no further examination.

THE COURT: Mr. Picotte?

MR. PICOTTE: May I have just a moment, Your Honor? (Off record discussion between Messrs. Picotte, Smith and Ottaviana).

MR. PICOTTE I have no question, Your Honor.

MR. SMITH: I have no questions, Your Honor.

THE COURT: All right, you may step down.
(Witness leaves the stand).

APPENDIX "B"

Testimony of Curtice Gardner as taken from the deposition, changes made thereto and testimony on trial.

I. Testimony with regard setting of gasoline prices at his station:

(a) *Testimony on Deposition*

Page Line
No. No.

- 5 24 A. I don't think so. Nobody ever said anything—well,
25 we just—I don't know as we'd say you set them—
26 they had certain prices on the stuff. Maybe you
27 call that setting a price.
28 Q. Who set the price?
29 A. I suppose Phillips Petroleum, I suppose.
30 Q. You didn't set them?
31 A. No.
32 Q. You just operated at the station at the price they
6 1 told you to operate, is that correct?
2 A. Yes.
3 Q. And that was all during your lease?
4 A. Yes, sure.

(b) *Changes made in Deposition*

Change

- 5 29 Strike the answer and substitute "If you mean the retail price at which gasoline was sold at my station, I set the price."

Reason Therefor

I misunderstood the question, and the change made here is the truth.

Page Line
No. No.

Change

5 31 Strike "No" and substitute "Yes."

Reason Therefor

This change reflects the truth. I had full power to set the prices of gasoline sold by me at my station, and I made the decision on that. Nobody but me ever made the decision as to what price I would charge for gasoline.

Change

6 2 Strike "Yes" and substitute "If you mean the price at which I sold gas, the answer is no."

Reason Therefor

This change reflects the truth.

(c) *Testimony at Trial*

125 17 Q. Now, who set the prices at the gas—at
18 your gasoline station where gasoline is sold
there?

19 A. I did.

20 Q. Huh?

21 A. I did.

II. *Testimony with regard who put the price on pumps*

(a) *Testimony on Deposition*

8 4 Q. As I understand it from your deposition, you say the
5 prices for the gasoline were set by Phillips Petroleum

Page Line
No. No.

- 6 Company? Is that correct?
7 A. Whether set by Phillips, Jim Bridges
or who it was set
8 by, I don't know. It was just like it is right
now.
9 They tell you to put so much on the pump
and that's
10 what it goes.
11 Q. They tell you the price you are going to
sell it for?
12 A. Yes.

(b) *Changes made in Deposition*

8 7-10

Change

Strike the entire answer and substitute the following: "At all times I raised or lowered the prices of gasoline at my station to meet competition. If the other Phillips stations went down in price, I had to go down to meet the competition, and I always followed the policy that I figured I didn't have any choice in this matter. I had to meet the prices at other stations in the city, and particularly the other Phillips stations, in order to survive in business, and when Jim Bridges or anyone else went down in price, I went down automatically to meet their price, but they were not the ones who changed my price. I was the one who made the decision on that, but my policy was simply to keep track of their prices, in order to meet them. In this sense, but in this sense only, Jim Bridges or the other dealers, when they went down in price, fixed my price, but they never told me I had to go down, nor did I ever make any agreement with them about that matter. I just automatically went down when I found

Page Line
No. No.

out they went down. That was my own personal business policy, and nothing else.

Reason Therefor

What I meant to convey by my answer to this question was that in a sense, Jim Bridges, fixed the price of gasoline at my station, because when he lowered his price, he forced me to lower mine, for competitive reasons. But he never indicated to me that I had to lower my prices, nor did he ever make the decision as far as my station was concerned. The competitive situation made the decision for me, as far as I was concerned. There was never any agreement between myself and Bridges concerning the retail prices of gasoline at my station, or anyone else.

8 12

Change

Strike "Yes" and substitute "No."

Reason Therefor

Except in the sense that when the other dealers in town lowered their price, I felt that I had to lower my prices to meet the competition. But I made the decision and there was never any agreement between any of the dealers that I know of.

(c) *Testimony at Trial*

- 126 2 Q. Did you post the advertisement that
3 would state the
4 price of gas on the pump?
5 A. The price that is on the pump?
6 Q. Yes.
7 A. They have a little square there where
8 the price is
9 set.
10 Q. Yes. And who sets the price?

Page Line
No. No.

- 126 9 A. I did.
10 Q. Did Phillips Petroleum or Bridges tell
you what
11 to sell it for?
12 A. No.
13 Q. They tell you what to put on the pump?
14 A. No.
127 5 Q. Now I ask you: Did they tell you the
price to put
6 on the pumps?
7 A. No, they didn't tell me exactly the price
to put on
8 the pump.
9 Q. Did they tell you the price that you were
going to
10 sell it for?
11 A. No.

III. *Testimony with regard placing of signs*

(a) *Testimony on Deposition*

- 8 20 Q. Well, let me break it down. I will with-
draw that
21 question. Did you, during March of 1964,
have large
22 signs stating the price of gasoline?
23 A. Yes.
24 Q. Were those signs changed during the
month of 1964?
25 A. That is when it all started, isn't it, in
March? Is
26 that when it all started?
27 Q. Yes. If you can recall.
28 A. Put a big sign up, that's all I know.
29 Q. Who put the sign up?
30 A. I guess you would have to say Jim
Bridges. His helper
31 put it up as far as I could say. I know I
didn't.

Page Line
No. No.

- 32 Q. You didn't put it up, or your employees?
9 1 A. That's true.

(b) *Changes made in Deposition*
Change

- 8 31 Strike "I know I didn't" and substitute "I don't think I put up the sign, but I did put the figures for the prices on the sign after the sign itself had been put up. In other words, there were removable numbers, so that the prices advertised on this sign could be changed, and I put those on the sign at all times, and I made the decision as to what the price shown on the sign from day to day would be."

Reason Therefor

I have refreshed my memory and this clarifies and makes my answer more accurate.

(c) *Testimony at Trial*

- 143 10 Q. Did you order that sign that is as large as that
11 board that was put on your property after the gas price was
12 lowered?
13 A. Did I order it?
14 Q. Did you order it from anyone?
15 A. Well, I wouldn't really say that I ordered the
16 sign. It come from the bulk station, I know that.
17 Q. Who did it come from?
18 A. The bulk station.
19 Q. And did you have anything to do with designating
20 what would be placed on the sign?
21 A. Yes, I put them on there myself.

Page Line
No. No.

22 Q. The wording, I mean, of today's prices;
did you

23 have anything to do with preparing that?

24 A. No.

25 Q. Do you know where the sign was made?

144 1 A. No.

2 Q. Do you know who made the sign?

3 A. No.

4 Q. Where did you get the sign?

5 A. I said it come from the bulk plant.

144 6 Q. And who put the sign up on your prop-
erty?

7 A. Well, it was left there. We put it up.

8 Q. Who put the sign up?

9 A. Well, I imagine either I or else my help.

10 Q. You didn't put it up? You didn't put
the sign up?

11 A. Well, I can't—heavens, I don't—you
mean did

12 I go out there and put the thing up and
stand it up?

13 Q. That's what I mean.

14 A. That is what you mean?

15 Q. Uh-huh.

16 A. I'd say I had a hand in it. One man
couldn't handle it alone.

IV. *Testimony with regard price fixing*

(a) *Testimony on Deposition*

15 30 Q. Mr. Gardner, you said, or at least I
understood you to

31 say, that you didn't fix the retail price of
gasoline

32 in your station, that Phillips did. Now is
that

16 1 true or not?

2 A. Well, I wouldn't say that Phillips fixed
it; I don't

3 know.

Page Line
No. No.

- 4 Q. Whose decision was it to raise or lower gasoline
5 prices? Was it yours, as an independent retail dealer?
6 A. No. It wasn't my idea, I'll tell you that. Heavens,
7 how could I stand to lose—of course, if the other
8 guys go down, you're going to have to go down with
9 them if you want to stay alive, I guess. It wasn't
10 my idea to lower the price of gasoline.
11 Q. Why did you lower the price of gasoline? What was
12 your reason for it?
16 13 MR. SKEDD: I'll object to the form of the question
14 as assuming facts not in evidence. He
15 has testified he didn't lower them; they
16 were lowered for him.
17 Q. Who did lower the price of gasoline in your station?
18 A. Well, to be perfectly frank with you, I think Jim
19 Bridges and LeRoy came up there and changed the pumps
20 and put the signs up.
21 Q. But who made the decision to come down in price in
22 your station? That's what I'm talking about. Did
23 you decide that yourself?
24 MR. SKEDD: The answer was "no".
25 A. It wasn't my idea.
26 Q. Who had the power?
27 A. Well, I don't know. Heavens, I just let them put it

No. No.
Page Line

- 28 up. If he wanted to put up a sign there for
32¢, I
29 was going to sell it for 32¢; that's what it
was.

(b) *Changes made in Deposition*

16 2-3 *Change*

Strike the entire answer and substitute "I fixed the retail price of gasoline in my station."

Reason Therefor

The truth is that the prices of gasoline at my station were fixed by competition, that is, by my own general business policy of automatically coming down to meet the competition, as I have explained in some of the changes to answers above set forth. That is the sense in which I meant my original answers which I have changed here. If the other stations went down in price, I felt that that I had to go down in price to meet the competition and in this sense, I did not feel that I was fixing the price of gasoline in my station. However, this does not mean that I did not have the power to make the decision. I could have kept my prices up if I had wanted to. I never did want to lower the price of gasoline, and I never agreed to it with anybody.

16 18-20 *Change*

Strike the entire answer and substitute "I did."

Reason Therefor

The same reason as given above for the other changes. On reflection I don't really know

whether Bridges actually did the work of changing the price on the pumps or not. I might have done it. At any rate, what I want to explain here is that I always felt that Jim Bridges jammed this gas war down my throat against my will, and in that sense, he was the one who changed the prices at my station. But I could have kept my prices up if I had wanted to. I lowered the prices of gasoline in my station on my own hook, because I felt I had to do so to meet the competition. Bridges merely told me that he was lowering his prices, and I knew the other dealers were doing the same, and I knew that if I was going to survive. I would have to lower my prices, so I did. There was never any agreement.

16 27-29

Change

Strike the entire answer and substitute "the other dealers had the power, so far as I was concerned, simply by lowering their prices. When they lowered the price, the competitive situation forced me to lower my price."

Reason Therefor

This changed answer reflects the truth. I did not understand the question until I read it, nor did I understand the line of questioning which led up to it.

(c) *Testimony at Trial*

- 149 23 Q. Do I understand your testimony now that
either you
24 or your employees may have put the sign up
on the day that
25 the prices were changed?
150 1 A. Put the—we changed it—the prices.

No. 21809 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JEFFERSON SAVINGS AND LOAN ASSOCIATION, etc.,
Appellant,

vs.

LIFETIME SAVINGS AND LOAN ASSOCIATION, etc.,
Appellee.

APPELLANT'S OPENING BRIEF.

McKENNA & FITTING,
AARON M. PECK,
427 West Fifth Street,
Los Angeles, Calif. 90013,
Attorneys for Appellant

FILED

AUG 31 1967

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SEP 13 1967

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No. 21809

IN THE

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JEFFERSON SAVINGS AND LOAN ASSOCIATION, etc.,

Appellant,

vs.

LIFETIME SAVINGS AND LOAN ASSOCIATION, etc.,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

The United States District Court of the Central District of California (hereinafter referred to as "the Court below") had jurisdiction over the action from which the instant appeal is taken pursuant to 28 U.S.C. Sections 1332 and 2201. There was a diversity of citizenship between Plaintiff Jefferson Savings and Loan Association (hereinafter referred to as "Jefferson"), a Colorado corporation, and Defendant Lifetime Savings and Loan Association (hereinafter referred to as "Lifetime"), a California corporation, and the sum in controversy exceeded \$10,000.00 [C. T. p. 2, line 27, to p. 3, line 5; p. 205, line 32, to p. 206, line 5].¹ Count I of the Complaint sets forth an actual contro-

¹"C. T." refers to "Clerk's Transcript", "R. T." refers to "Reporter's Transcript".

versy between Jefferson and Lifetime as to which Jefferson sought a declaration of its legal rights by the Court below [C. T. p. 2, line 21, to p. 3, line 29].

This Court has jurisdiction over the instant appeal pursuant to 28 U.S.C. Section 1291. It is an appeal from a final judgment of the Court below [C. T. pp. 212-214], and a notice of appeal was timely filed [C. T. p. 216].

Statement of the Case.

Jefferson and Lifetime² are state-chartered savings and loan associations organized and operating under the laws of Colorado and California, respectively [C. T. p. 2, line 29, to p. 3, line 5; p. 205, line 32, to p. 206, line 5].

In September of 1961, Jefferson and Lifetime entered into a "Loan Participation Agreement" (hereinafter referred to as "LPA") under which, for \$358,242.92, Jefferson acquired from Lifetime a seventy-five per cent interest in thirty-seven existing loans secured by thirty-seven first deeds of trust on an equal number of parcels of real property [C. T. pp. 7-9; p. 206, lines 24-30]. In accordance with the terms of the LPA, Lifetime retained possession and control of all loan instruments, including notes and deeds of trust [C. T. p. 206, lines 31-32].

Lifetime was paid a fee for servicing the loans, consisting of all interest thereon in excess of 6.5% (the loans bore interest at rates varying from 7.2 to 7.8),

²Since the commencement of the action below, Lifetime has merged into Lincoln Savings and Loan Association and, pursuant to stipulation, the Court below has ordered that any judgment rendered herein against Lifetime should be binding on Lincoln [C. T. pp. 220-222].

all late fees, fees for change of mortgage statements and loan modifications, and 5% of all rentals collected on foreclosed property [C. T. pp. 9-10].

The LPA made specific provision for the rights of the parties in the event that Lifetime foreclosed a deed of trust, acquired the property at the trustee's sale, and thereafter sold it to a third party. It provided, *inter alia*, as follows:

"17. Seller shall give prompt notice to Purchaser as to any default under the terms of any mortgage in which Purchaser has a participation interest. Seller may act upon any loan in default and the security property by any procedure which may be necessary in its sole discretion, including the acceptance of a deed in lieu of foreclosure or the purchase at a foreclosure sale or trustee's sale. Seller shall exercise the judgment of a prudent lender in Seller's lending area. Seller shall make an appraisal of the property within a reasonable time before taking any action affecting such loan in default. Seller may manage, maintain, or dispose of property so acquired in any manner which it shall deem necessary, the parties hereto sharing ratably in the income and expense thereof. *Upon such disposition of such property, Purchaser shall share ratably with Seller in the net proceeds of sale to the extent of Purchaser's share in the unpaid principal balance due on the loan.* It is further understood that it shall be within the sole discretion of Seller to determine whether foreclosure shall be pursuant to a power of sale, or through court action, and as to whether or not a deficiency judgment shall be obtained.

23. Paragraph 17 hereof is hereby amended so that Purchaser may elect to have foreclosure proceedings instituted and carried to conclusion by Seller in accordance with this Agreement on any loan which has been delinquent for a period of three consecutive months." [C. T. p. 9; emphasis added].

In 1963, eight of the thirty-seven loans went into default for failure of the borrowers to discharge their loan obligations. Lifetime instituted foreclosure proceedings under the power of sale clause in the deeds of trust and, in due course, through purchase at the trustee's sales foreclosing the deeds of trust securing the loans, acquired legal title to eight parcels of real property [C. T. p. 207, lines 1-17].

In August of 1964, without notice to or consultation with Jefferson of any nature whatsoever, Lifetime sold the eight properties. The purchasers were David and Alberta Durham (hereinafter referred to as "the Durhams"). The sale was effected in two separate, but concurrent or almost concurrent, transactions: three properties were sold in one, the remaining five (together with six others in which Jefferson had no interest) in the other [C. T. p. 207, line 23, to p. 208, line 26].

The three properties which had a book value of \$64,826.61, were sold for \$60,000.00. Lifetime financed one hundred per cent of the purchase price and loaned the Durhams an additional \$10,000.00 to be expended for rehabilitating the properties [C. T. p. 207, line 27, to p. 208, line 6; Pltf. Ex. 14].

The eleven properties were sold for \$105,500.00 of which \$49,450 was for the five properties in which Jefferson was interested. Again Lifetime financed one hundred per cent of the purchase price, but no cash advance to the Durhams was involved [C. T. p. 208, lines 11-26; Pltf. Ex. 11].

The sales agreement for the eleven properties contained a provision governing the release of individual parcels from Lifetime's encumbrance:

“Association [Lifetime] will cause individual parcels to be released from said deed of trust upon the payment of the following sums:

“1. Upon the payment of the amount specified as ‘Ninety Day Price’ if paid within ninety days from the date hereof, and in such case there shall be credited against said note the amount specified in ‘Long Term Price.’

“2. Upon the payment of 115% of the amount specified as ‘Long Term Price,’ less any amortization of principal in the meantime, if said payment is made after ninety days from the date hereof.

“3. No parcels shall be released at any time the aforesaid note is in default.” [Pltf. Ex. 12].

The sales closed on August 19, 1964. Title to all properties was conveyed from Lifetime to the Durhams.

The Durhams executed notes to Lifetime in the amount of \$70,000.00 and \$105,500.00, each bearing interest at the rate of 6.6% per annum, and secured by first deeds of trust on the three properties and the eight properties respectively. Title policies insuring Lifetime as beneficiary under the deeds of trust and the Durhams as owners of the properties were issued [C. T. pp. 88-116].

On August 25, 1964, six days later, Lifetime remitted to Jefferson its seventy-five per cent of the sales price of the three properties, \$45,092.80,³ but not its seventy-five per cent share of the sales price of the other five properties. The excuse which it offered contained in a letter from Lifetime to Jefferson, revolved around the existence of the "ninety day price" release option:

"Don . . . the sale of Real Estate Owned properties about which we talked when you were here has actually been consummated.

"I enclose a Photostat copy of the sales agreement that was used. A total of eleven properties were involved and your Association was interested in five of them (old Loan No's. 433, 469, 438, 475 and 476; REO No's. 49, 68, 69, 81 and 82, respectively). We also enclose a Xerox copy of the closing statement.

"You will note that the sales agreement provides for two sales prices: one in case we are paid off in cash before November 6, 1964; and one in case we are called upon to carry a long term Loan to Facilitate. The escrow was closed on the basis of the long term loan, however, as you will note by the copy of the closing statement attached.

"Until the purchaser's performance as of November 6 is determined, we are unable to offer your Association any reasonable settlement except your proportionate share of the collected payments on

³The excess over seventy-five per cent of \$60,000.00 is accounted for by the proceeds of an insurance claim for damage to the properties which was included in computing the amount due Jefferson [Pltf. Ex. 14].

the \$105,500.00 loan. In the event that Reverend Durham is able to take advantage of the 90 day price, it would appear that your Association would receive 75% of the net sales proceeds of \$31,099.15." [Pltf. Ex. 11].

Conveniently overlooked by Lifetime was the fact that the sales agreement also permitted Lifetime to exact a premium in the amount of fifteen per cent of the sales price in the event that the Durhams wished to pay off the encumbrance *after* ninety days [Pltf. Ex. 12].

The Durhams did not take advantage of the "ninety day price." Ultimately, the notes which they gave went into default and Lifetime accepted a "deed in lieu of foreclosure" to the eleven properties [R. T. p. 122, line 24, to p. 123, line 19].

Lifetime refused to pay Jefferson its ratable share of either the ninety day price or the sales price, despite Jefferson's repeated and progressively more insistent demands upon it. [see Pltf. Exs. 17, 18, 19, 20, 28, 29 and 30].

On August 26, 1965 Jefferson filed the action in the Court below from which the instant appeal is taken [C. T. pp. 2-11]. Count I was for declaratory relief under 28 U.S.C. Section 2201 and sought a declaration of the respective rights and duties of the parties under the LPA in the event that Lifetime purchased property subject thereto at foreclosure sales and thereafter disposed of it. As stated in the Complaint:

"The defendant [Lifetime] contends that it has no duty to pay to the plaintiff [Jefferson] seventy-five per cent (75%) of the selling price (less the plaintiff's share of the applicable costs and

expenses of sale) obtained by the defendant in exchange for the real property which is the subject of the Loan Participation Agreement to which the defendant obtains title at a trustee's sale at foreclosure and thereafter sells and conveys to a third party. Plaintiff disputes said contention." [C. T. p. 3, lines 21-26].

Count II, an action for breach of contract, sought damages against Lifetime for its failure to remit to Jefferson seventy-five per cent of the sales price of the five properties purchased by the Durhams. Jefferson alleged that Lifetime, having acquired the properties through foreclosure at trustee's sales foreclosing deeds of trust of which it was beneficiary "conveyed the five (5) parcels * * * [to the Durhams] for the sum of \$49,450." As a result, Lifetime was obligated, under the LPA, "to remit and pay to the plaintiff [Jefferson] seventy-five per cent (75%) of said sum, or the sum of \$37,087.50 (less the plaintiff's share of the costs and expenses of sale)" [C. T. p. 4, lines 11-18].⁴

Lifetime's Answer, filed on September 16, 1965, denied the interpretation placed upon the disputed provision of the LPA by Jefferson; and, while admitting the foreclosures and resale to the Durhams, alleged by Jefferson in Count II, denied that it was obligated as a result of the sale to pay Jefferson any sum whatever [C. T. pp. 12-15].

⁴To avoid unnecessary repetition, Jefferson will not hereafter allude to this reduction for costs and expenses of sale; any reference to Jefferson's claimed damages is understood to be properly reduced by its share of the costs and expenses of the sale to the Durhams, found by the trial court to be \$325.85 [C. T. p. 209, lines 9-11].

Both counts were tried, in a four-day trial, in October of 1966 before the Honorable Harry Westover [R. T. pp. 1-534]. With regard to Count I, there was introduced without objection, considerable extrinsic evidence relevant to the question of the intent of the parties concerning the disputed provision of the LPA. At the conclusion of the trial, Judge Westover held that Jefferson's interpretation of the provision was correct and that Lifetime's was incorrect: When Lifetime, without Jefferson's consent, sold property which was the subject of the LPA, and which it had acquired through foreclosure, it was obligated to pay over to Jefferson its ratable share of the net proceeds of the sale [C. T. p. 212, line 32, to p. 213, line 26].

Lifetime has not appealed from the Court's judgment as to the appropriate interpretation of the LPA under Count I. Hence, the instant appeal is concerned solely with the amount due to Jefferson under Count II.

With respect to Count II, the Court found that the allegations of Jefferson were true: Lifetime had acquired title to the five properties in question at trustee's sales foreclosing the deeds of trust thereon and thereafter, without the consent of Jefferson, had sold the properties to the Durhams for \$49,450.00 [C. T. p. 208, lines 11-26; Pltf. Ex. 16].

Nevertheless, it did not award Jefferson seventy-five per cent of the sales price of these parcels, which would have been \$37,087.50. Rather, it held that because of a letter communication from *Lifetime to Jefferson*,

upon which *Jefferson* “relied”, *Jefferson* was “estopped” to claim more than 75% of \$31,099.15, or \$23,324.36. The Court, in Finding 16, stated:

“On August 25, 1964, Lifetime stated to *Jefferson* in writing that the latter would receive 75% of \$31,099.15 in connection with the subject five (5) loans in the event that the Durhams took advantage of the 90 day purchase price on the eleven parcel agreement (Exhibit 11 in evidence). By reason of the fact that *Jefferson* introduced Exhibit 11 in evidence, it is deemed to have relied upon the statements made therein as defining Lifetime’s duties to it. Accordingly, since *Jefferson* did not at any time communicate to Lifetime its disagreement with the amount set forth in the last line of Exhibit 11, *Jefferson* is estopped to claim any sum in connection with the sale of the subject five (5) properties greater than 75% of \$31,099.15, or \$23,324.36.” [C. T. pp. 208-209].

On December 30, 1966, *Jefferson* filed a timely notice of appeal [C. T. p. 216]. *Jefferson* contends that the District Court committed obvious error in limiting *Jefferson*’s damages under Count II to \$23,324.36 and not awarding it seventy-five per cent of the sales price, or \$37,087.50.

Statement of Issues.

1. Did the Court below err, as a matter of law, in not awarding to *Jefferson* judgment under Count II in the principal amount of \$37,087.50, plus interest thereon at the legal rate from August 25, 1964?
2. Did the Court below err, as a matter of law, in limiting the principal amount of the award to *Jefferson* under Count II to \$23,324.36?

3. Did the Court below err, as a matter of law, in finding that Jefferson is estopped to claim any sum under Count II greater than seventy-five per cent (75%) of \$31,099.15, which is \$23,324.36?

4. Did the Court below err, as a matter of law, in finding that any representation of Lifetime had the effect of limiting the amount recoverable by Jefferson under Count II to seventy-five per cent (75%) of \$31,099.15, which is \$23,324.36?

5. Did the Court below err, as a matter of law, in finding, in Finding 16 of the Findings of Fact and Conclusions of Law, that: "By reason of the fact that Jefferson introduced Exhibit 11 in evidence it is deemed to have relied upon the statements made therein as defining Lifetime's duties to it. Accordingly, since Jefferson did not at any time communicate to Lifetime its disagreement with the amount set forth in the last line of Exhibit 11, Jefferson is estopped to claim any sum in connection with the sale of the subject five (5) properties [the subject of Count II of the Complaint] greater than 75% of \$31,099.15, or \$23,324.36."?

6. Did the Court below err, as a matter of law, in finding that Jefferson had relied upon Lifetime's representation that Jefferson would be paid 75% of \$31,099.15, or \$23,324.36?

Specification of Errors.

1. The Court below erred, as a matter of law, in not awarding to Jefferson judgment under Count II of the Complaint in the principal amount of \$37,087, plus interest thereon at the legal rate from August 25,

1964 (but less costs and expenses of the sale of the property which was the subject of said Count II in the amount of \$325.85).

2. The Court below erred, as a matter of law, in limiting the principal amount of the award to Jefferson under Count II of the said Complaint to \$23,324.36.

3. The Court below erred, as a matter of law, in finding that Jefferson is estopped to claim any sum under Count II of the said Complaint greater than seventy-five percent (75%) of \$31,099.15, which is \$23,324.36.

4. The Court below erred, as a matter of law, in finding that any representation of Appellee Lifetime, had the effect of limiting the amount recoverable by Jefferson under Count II of the said Complaint to seventy-five percent (75%) of \$31,099.15, which is \$23,324.36.

5. The Court below erred, as a matter of law in finding, in Finding 16 of the Findings of Fact and Conclusions of Law, that:

“By reason of the fact that Jefferson introduced Exhibit 11 in evidence it is deemed to have relied upon the statements made therein as defining Lifetime's duties to it. Accordingly, since Jefferson did not at any time communicate to Lifetime its disagreement with the amount set forth in the last line of Exhibit 11, Jefferson is estopped to claim any sum in connection with the sale of the subject five (5) properties [the subject of Count II of the said Complaint] greater than 75% of \$31,099.15, or \$23,324.36.”

ARGUMENT.

I.

The Court Below Determined That, Under the Terms of the LPA, When Properties Subject Thereto Were Acquired by Lifetime Through Foreclosure and Thereafter Sold to Third Parties, Lifetime Was Required to Remit Seventy-Five Per Cent of the Proceeds of the Sale to Jefferson. Five Properties Subject to the LPA Were Acquired by Lifetime and Resold for \$49,450.00. Hence, Under the LPA, Jefferson Was Entitled to \$37,087.50. The Court's Findings That Jefferson Was Estopped to Claim More Than Seventy-Five Per Cent of \$31,099.15 Is Preposterous.

Count I of the Complaint sought an adjudication of the respective rights and duties of Lifetime and Jefferson under the LPA. In particular, there was presented to the Court the question of whether, when Lifetime acquired title to property subject to the LPA through foreclosure and then resold that property to a third person, it was under an obligation imposed by the LPA to pay to Jefferson seventy-five per cent of the selling price.

The District Court, based upon evidence adduced through four days of trial, determined that question in the affirmative: When Lifetime acquired, through foreclosure, title to real property which was subject to the LPA,

"Lifetime holds such title as a tenant in common with Jefferson, with the former having an indivisible 25% interest and the latter having an indivisible 75% interest in such property." [C. T. p. 213, lines 10-12]

Under the terms of the LPA, Lifetime is required to obtain the written consent of Jefferson to a proposed sale of the subject properties [C. T. p. 213, lines 13-19]; and

“In the event that Lifetime sells or disposes of any real property which had formerly secured the payment of any loan included within the LPA and which property had been acquired through foreclosure proceedings by Lifetime pursuant to the terms and provisions of the LPA, without the written consent of Jefferson, Jefferson is entitled to an immediate payment of 75% of the net sales proceeds obtained for such property by Lifetime.” [C. T. p. 213, lines 20-26].

Therefore the sole issue presented on this appeal is whether or not the damages awarded to Jefferson under Count II are inadequate as a matter of law. Jefferson submits that they are.

The Court below found that Lifetime acquired the five properties in question through purchase at trustee's sales foreclosing the deeds of trust securing loans that were subject to the LPA; and that thereafter, Lifetime, without the consent of Jefferson, sold the five properties to the Durhams for a price of which \$37,087.50 was seventy-five per cent. In view of the Court's interpretation of the LPA, these findings would appear to compel a judgment for Jefferson in the amount of \$37,087.50.

But this was not the decision of the Court below. Instead, it awarded Jefferson seventy-five per cent of \$31,099.15, or \$23,324.36. The Court's stated justifi-

cation for this decision, anomalous on its face, was “estoppel”—an estoppel which arose *against Jefferson* because of a representation *by Lifetime*:

“On August 25, 1964, Lifetime stated to Jefferson in writing that the latter would receive 75% of \$31,099.15 in connection with the subject five (5) loans . . . (Exhibit 11 in evidence). By reason of the fact that Jefferson introduced Exhibit 11 in evidence, it is deemed to have relied upon the statements made therein as defining Lifetime’s duties to it. Accordingly, since Jefferson did not at any time communicate to Lifetime its disagreement with the amount set forth in the last line of Exhibit 11, Jefferson is estopped to claim any sum in connection with the subject five (5) properties greater than 75% of \$31,099.15, or \$23,324.36.” [C. T. p. 208, line 32, to p. 209, line 9].⁵

⁵The irony of the Court’s findings is accentuated by the fact that Lifetime’s statement to Jefferson that it would receive “75% of the net sale proceeds of \$31,099.15” was almost certainly a misstatement of its true intent, undoubtedly due to a typographical error. It is obvious from the letter that it was Lifetime’s intention to pay Jefferson 75% of the “90 day price.” The “90 day price” of the five properties was not \$31,099.15, but rather \$41,900.00. Seventy-five per cent of \$41,900.00, less \$325.85—the precise amount which the Court found to be the portion of expenses of the sale to the Durhams properly borne by Jefferson—is \$31,099.15.

Thus:

“90 day price”—\$41,900.00	
75% of “90 day price”	\$31,425.00
less costs and expenses of sale	325.85
	<hr/>
Net	\$31,099.15

Hence, the letter was undoubtedly intended to read “75% of the net sale proceeds *or* \$31,099.15.” The \$31,099.15 figure in Lifetime’s August 25 letter is circled and marked with a question mark by Jefferson on Jefferson’s copy [See Pltf. Ex. 11], thus indicating that Jefferson recognized that the figure was erroneous.

In other words, Jefferson was estopped because of something that Lifetime told it upon which it, Jefferson, had supposedly relied.

The fallacy of this proposition is obvious. Estoppel is an equitable doctrine, under which a party who has misled another into changing his position may not be allowed to show that the representation which induced the change of position was untrue. It applies against the person who made the representation and not against the person to whom the representation was made:

“Estoppel may be defined to be a bar by which a man is precluded from denying a fact in consequence of his own previous action which has led another to so conduct himself that, if the truth was established, that other would suffer.”

Davenport v. Stratton, 24 Cal. 2d 232, 243 (1944).

“... one who acts to his detriment on the faith of conduct of the kind revealed here should be protected by estopping the party who has brought about the situation. . . .”

Goodman v. Dicker, 169 F. 2d 684, 685 (D.C. Cir. 1948).

“Estoppel is said to be the effect of the voluntary conduct of a party whereby he is precluded from asserting rights which perhaps otherwise might exist against another person who in good faith has relied upon such conduct and has been led thereby to change his position for the worse.”

James Talcott, Inc. v. Associates Discount Corp., 302 F. 2d 443, 446 (8th Cir. 1962).

In short, a more flagrant misconstruction of the estoppel doctrine than that indulged in in the instant action is difficult to imagine.

But even if the unexplainable construction placed upon the estoppel doctrine by the Court below was correct, its application to the instant case for the purpose of limiting Jefferson's recovery to 75 per cent of \$31,-099.15 would still be erroneous.

First of all, estoppel is an affirmative defense which is waived unless it is pleaded. *Harrison v. Hanson*, 165 Cal. App. 2d 370, 378 (1958). Lifetime's answer contains nothing which could be construed as even remotely suggesting an estoppel plea [C. T. pp. 12-15].

Secondly, the record is bereft of evidence sufficient to support findings that essential elements of estoppel such as "reliance" are present. While the findings do allude to the subject of "reliance", the sole basis upon which the Court below predicated its finding that Jefferson had "relied" upon Lifetime's representation was that Jefferson had introduced into evidence the letter in which the representation was contained:

"By reason of the fact that Jefferson introduced Exhibit 11 in evidence, it is deemed to have relied upon the statements made therein as defining Lifetime's duties to it." [C. T. p. 209, lines 3-5].

Jefferson can only observe that if a finding of reliance as a required element of estoppel can arise against a litigant solely because the litigant introduced into evidence the document in which the representation is contained, litigants must indeed be circumspect as to the evidence which they bring before the court.

As a matter of fact, there could have been any number of reasons that Jefferson introduced Exhibit 11 into evidence, including the simple desire to bring before the court all communications between the parties relevant to the subject matter of the lawsuit regardless of the particular issues in the lawsuit to which they might pertain. The mere act of introduction in itself cannot under the dictates of either law or logic be regarded as probative of anything.⁶

Jefferson is mindful of the rule of appellate practice that a decision of the trial court will be upheld if the result is correct, even though the court's reasoning is erroneous.

Commissioner of Internal Revenue v. Slimson Mill Co., 137 F. 2d 286 (9th Cir. 1943).

But, in the instant case, there is no conceivable basis upon which to sustain the action of the Court below. Jefferson's claim rested upon a contract, the LPA. The Court construed the relevant portion of that contract and the construction is final and binding. Under the contract, when Lifetime sold LPA properties which it had acquired through purchase at trustee's sales, without Jefferson's consent, Jefferson was entitled to seventy-five per cent of the sales price. The Court below found, and the facts are really undisputed, that Lifetime sold the five properties in question which it had acquired through purchase at trustee's sales without Jefferson's consent, and the sale price was \$49,450.00.

⁶Indeed, the fact that the \$31,099.15 figure on Jefferson's original of the Lifetime letter is marked with a question mark would seem to require the opposite inference—that Jefferson realized that the figure was incorrect.

The appropriate measure of damages for breach of contract is the benefit which the aggrieved party would have obtained had the contract been performed in accordance with its terms.

B. C. Richter Contracting Co. v. Continental Can Co., 230 Cal. App. 2d 491, 505 (1964).

If Lifetime had properly discharged its obligation under the LPA, upon the sale of the five properties Jefferson would have received seventy-five per cent of \$49,450.00, or \$37,087.50. Hence, \$37,087.50, less an allowance for expenses of sale of \$325.85, is the only possible correct award to Jefferson under Count II.

II.

This Court Has the Power to Correct the Judgment of the Trial Court.

An appellate court has the power to amend an erroneous judgment, without remanding the case to the trial court.

Saulsberry v. Maddix, 125 F. 2d 430, 436 (6th Cir., 1942); cert. den. 317 U.S. 643;

Boyer v. Murphy, 202 Cal. 23, 35 (1927);

Stetson v. Sheehan, 52 Cal. App. 353, 362 (1921).

Thus, where there is error arising from a mistake of law in the amount of damages awarded to a plaintiff, and the record contains the data required to ascertain the correct damages, the appellate court will itself amend the judgment and thus dispose of the litigation.

Solomon v. Franco, 112 Cal. App. 679 (1931);

Feckenscher v. Gamble, 12 Cal. 2d 482, 500 (1938);

American-Hawaiian Eng. & Constr. Co. v. Butler, 17 Cal. App. 764 (1912).

In the instant case there is, as we have demonstrated in section I, *supra*, only one correct judgment possible. The Court below made findings, supported by uncontroverted evidence, as to the amount of seventy-five per cent of the sales price of the five properties and the amount of the expenses of sale which, under the terms of the LPA, are properly attributable to Jefferson. Hence the Court has all information required to enter a judgment for the proper amount.

Economy of judicial effort is important to the efficient administration of justice. It is apparent that obviating further proceedings in the Court below by correcting the error in question in this Court will best promote such economy.

III.

Conclusion.

For the foregoing reasons, Jefferson respectfully submits that the judgment from which this appeal is taken should be amended by the court to increase the principal amount of the damages awarded to Jefferson under Count II to \$37,087.50, less \$325.85, or \$36,761.65.

Respectfully submitted,

McKENNA & FITTING,

AARON M. PECK,

By AARON M. PECK,

Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

AARON M. PECK

No. 21809

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JEFFERSON SAVINGS AND LOAN ASSOCIATION, etc.,
Appellant,

vs.

LIFETIME SAVINGS AND LOAN ASSOCIATION, etc.,
Appellee.

APPELLEE'S BRIEF.

FILED

DEC 13 1967

WM. B. LUCK, CLERK

WEITKAMP, RIDDLE & BEDROSIAN,
10724 White Oak Avenue,
Granada Hills, Calif. 91344,
Attorneys for Appellee.

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APPELLEE'S BRIEF.

Statement of the Case.

For the sake of convenience the United States District Court of the Central District of California will hereinafter be referred to as "The Court below", the plaintiff Jefferson Savings & Loan Association, will hereinafter be referred to as "Jefferson", and the defendant Lifetime Savings and Loan Association will hereinafter be referred to as "Lifetime".

There are three particular obvious errors in the Statement of the Case by counsel for Jefferson.

At page 4 of its brief Jefferson states: "In August of 1964, without notice to or consultation with Jefferson of any nature whatsoever, Lifetime sold the eight properties". The record clearly shows that there was consultation with Lifetime and that Jefferson had knowledge that the eight properties were to be sold. Both Donald Henke, the President of the plaintiff, and Rob-

ert Sonheim, General Counsel and Secretary of the plaintiff, as well as Burk L. Humphrey, testified that they discussed this matter at the office of defendant on August 6, 1964 [R. T. pp. 421-442; pp. 263-265; pp. 288-290]. In addition, correspondence which emanated from Burk L. Humphrey to Mr. Henke under date of August 25, 1964, made reference to the sale of properties "about which we talked when you were here" [Pltf. Ex. 11].

The second obvious error in the plaintiff's Statement of the Case appears at page 7 of its brief where it states

"conveniently overlooked by Lifetime was the fact that the sales agreement also permitted Lifetime to exact a premium in the amount of fifteen per cent of the sales price in the event that the Durhams wished to pay off the encumbrance after 90 days."

The pertinent provision of the sales agreement [Pltf. Ex. 12] does not so provide but rather does provide that in the event the Durhams wanted a release of any of the individual parcels out of the total of eleven parcels covered by the single trust deed, they could then pay one hundred fifteen per cent of the amount for any individual parcel. It is common practice to provide for release clauses when a single trust deed covers multiple parcels of real property. Obviously the amount of each individual payment would have to be credited against the total long term purchase price.

The third and most serious error on the part of the plaintiff under the Statement of the Case is found at

page 9 of the Plaintiff's brief where plaintiff states as follows:

"At the conclusion of the trial, Judge Westover held that Jefferson's interpretation of the provision was correct and that Lifetime's was incorrect: when Lifetime, without Jefferson's consent, sold property which was the subject of the LPA, and which it had acquired through foreclosure, it was obligated to pay over to Jefferson its ratable share of the net proceeds of the sale."

On pages 7 and 8 of its brief plaintiff states that its contention was that defendant Lifetime had a duty to pay to Jefferson seventy-five per cent of the *selling price* (less the plaintiff's share of the applicable costs and expenses of sale) when it sells and conveys to a third party (emphasis added). The court's judgment on Count I is not to this effect but instead the judgment of the Court clearly provides that Lifetime must obtain the written consent of Jefferson to the terms of sale before it can sell or otherwise dispose of any real property which had formerly secured the payment of any loan included within the LPA and which had been acquired through foreclosure proceedings by Lifetime. The judgment further provides that in the event Lifetime should sell or otherwise dispose of any real property without the written consent of Jefferson, then Jefferson is entitled to an immediate payment of 75% of the *net sales proceeds* (not *selling price* as plaintiff contended) obtained for such property by Lifetime.

Thus it can be seen that there are two distinct differences between the plaintiff's original position and the judgment of the court. The first is that Lifetime may sell with the written consent of Jefferson and thus not have a duty to make any payment. The second is that even should there be a sale without the written consent of Jefferson, the obligation of Lifetime under the judgment of the court is to pay 75% of the *net sales proceeds* and not necessarily the *selling price*.

It is to be noted that one of the major issues in the trial of Counts I and II in the court below was whether or not there were any *net sales proceeds*. The record is devoid of any finding that there were actually any net sales proceeds other than a single promissory note secured by a deed of trust. Actually, the trial judge himself stated that no money passed hands at all [R. T. p. 195, lines 19-25]. This is also evidenced by the closing statements from the escrow holder [C. T. pp. 117 and 119]. In fact, the trial court stated "there have been no net proceeds at all in this sale" [R. T. p. 190, lines 1-2]. (Emphasis added).

ARGUMENT.

I.

To Prevail in This Appeal Plaintiff Must Show That There Is No Substantial Evidence to Support the Findings of Fact.

Although the plaintiff does not specifically state such to be the case, in order for it to prevail in this appeal it must attack finding 16 of the Findings of Fact and Conclusions of Law which stated that Jefferson is deemed to have relied upon the statements made in Exhibit 11 as defining Lifetime's duties to it on the ground that there is not any substantial evidence to sustain it.

The power of an Appellate Court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the Finding of Fact and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.

American Loan Corp. v. California Commercial Corp., 211 Cal. App. 2d 515, 27 Cal. Rptr. 243 (1963).

If there is any reasonable doubt as to the sufficiency of the evidence to sustain a finding, the Appellate Court should resolve that doubt in favor of the finding and in searching the record and exploring the inferences which may arise from what is found there. To discover whether such doubt or conflict exists the Court should be realistic and practical.

American Loan Corp., supra;

Brewer v. Simpson, 53 Cal. 2d 567, 2 Cal. Rptr. 609 (1960).

Plaintiff has not carried its burden in this appeal and has failed to show where there was a lack of any substantial evidence to sustain the finding of fact.

To the contrary, defendant respectfully submits that it will show hereinafter that the evidence supports the findings of fact.

II.

The Judgment of the Court Below on Count I Was a Determination as to the Rights of the Parties in the Future and Did Not Affect the Rights of the Parties Under Count II.

The plaintiff advances a conclusion which is not supported by the evidence nor the findings of fact or the judgment of the court. That is, that the adjudication of the respective rights and duties of the parties under Count I affected the rights and duties of the parties under Count II.

Count I was a declaratory relief count seeking the court's determination as to the rights of the parties *in the future* under the LPA. In other words, by the plaintiff's own statements the Findings of Fact, the Conclusions of Law and the Judgment of the Court below the adjudication under Count I did not pertain to Count II but only to the rights and duties of the parties *in the future*.

The final judgment of the Court below on Count I pertains to future dealings inasmuch as it states "In the event that Lifetime sells or otherwise disposes of any real property . . ."; thus the wording which was drafted by counsel for plaintiff is in the future tense. The statement is that if Lifetime *sells*, not *if it has sold* [C. T. p. 213, lines 20-26; see also Conclusion of

Law Number 7 [C. T. p. 210, lines 26-31] which was drawn by counsel for plaintiff (emphasis added).

It should further be observed that the Findings of Fact, Conclusions of Law and Judgment on Count II are based on the particular facts pertaining to the sale of the five properties which were the subject of Count II and that these are not involved in Count I.

Finding of Fact Number 15 states that Lifetime by its conduct and statements made certain representations in connection with the sale of the five subject parcels of real property as to Findings of Fact Numbers 16 and 21 [C. T. pp. 208-209]. That the declaratory judgment on Count I only pertains to the rights and duties of the parties in the future is further evidenced by the remarks of counsel for the plaintiff contained in his final argument. There he stated that he was asking the court for declaratory relief as to the rights and duties of the parties with respect to those loans which *still remain* the subject of the contract and “declaratory relief as to the twenty-nine remaining loans.” [R. T. p. 436, lines 7-22].

III.

There Are No Findings of Fact nor Is There a Judgment of the Court Below Which Provides That the Defendant Must Pay to the Plaintiff 75% of the Net Sales Price on the Five Properties Sold Under Count II.

Only one of the Findings of Fact of the Court below sets forth the amount which is to be paid by Lifetime to Jefferson. This is Finding Number 16 [C. T. p. 208, line 32, to p. 209, line 9]. There is no finding that Lifetime must pay to Jefferson the amount which

it had invested in the properties nor that it must pay to Jefferson 75% of the sales price or 75% of the net proceeds or any specific figure other than that of \$23,324.36 contained in Finding Number 16.

IV.

Absent Any Conduct on the Part of Lifetime Representing to Jefferson That It Would in Connection With the Sale of the Five Properties Pay to Jefferson Any Amount It Was Not Required to Make Any Payments and Had Very Broad Discretionary Powers and Authority Under the Terms of the LPA.

The LPA contemplated that all negotiations, servicing and dealings of any kind or nature pertaining to the loans and the properties which secured them and which were the subject of the LPA were to be performed by Lifetime and not by Jefferson. In this regard, the following provisions of the LPA are pertinent:

1. In paragraph 5 it is stated that Jefferson should in no event take part or be active in negotiations or preliminary steps leading to the consummation of loans which at the time of execution of the agreement or thereafter should become the subject of participation purchases by Jefferson.

2. Paragraph 8 specifically provides that nothing in the agreement is to be construed as a warranty or guarantee by Lifetime as to future payments by any of the mortgage debtors and that the sale of a participating interest by Lifetime to Jefferson was to be without recourse.

3. Under the provisions of paragraph 11 Lifetime was to retain physical possession of all documents, was to retain the loans in its name and was authorized to deal with the loans as though it were the sole and absolute owner.

4. Further evidence of the complete discretion and authority which it was contemplated would be vested in Lifetime is found in paragraph 12 which provides that Lifetime had the right to accept additional security for any participation loan, release collateral security, etc.

5. Under the provisions of paragraph 17 Lifetime was empowered to act upon any loan in default and the security property by any procedure which might be necessary in its sole discretion. It is to be noted that this authority specifically provided that Lifetime might act not only upon the loan which was in default but also upon the property which secured the loan in such manner as in its sole discretion it found necessary. Lifetime was not required to confer with Jefferson or obtain its consent or to even advise it prior to entering into any transaction pertaining to the security property.

Paragraph 17 further provides that Lifetime could manage, maintain or dispose of any security property acquired in any manner which it deemed necessary and that the parties would share ratably in the income and expense thereof and in the net proceeds of sale [C. T. pp. 7-9].

As is seen above, the LPA conferred very broad discretionary authority and powers on Lifetime both with respect to the management and maintenance of the loans or properties and also as to the disposition of the properties after foreclosure. Nowhere in the LPA is

there found any provision which requires Lifetime to sell only for cash. If this were the intent of the LPA it would obviously be so stated. Instead of restricting the authority of Lifetime in such a manner, the LPA gave to Lifetime the broadest possible authority, *i.e.*, that of disposing of the property in any manner which it deemed necessary.

Paragraph 17 of the LPA clearly provides that Jefferson was to share ratably with Lifetime in the net proceeds of sale to the extent of Jefferson's share in the unpaid principal balance due on the original loan. By Count II, Jefferson sought to effect a change in the wording of the LPA to provide that it was to receive its pro rata interest in cash from Lifetime even though no cash had been received on account of the sale or disposition of the property. This, of course, would have had the effect of making Lifetime a guarantor of the original loan which would be in direct contradiction to the provisions of paragraph 8 of the LPA set forth above.

Paragraph 13 of the LPA specifically provides that Lifetime had the *option* to repurchase from Jefferson its participation interest but that it did not have an obligation to do so [C. T. p. 8]. (Emphasis added).

The term "net proceeds" is defined as anything of value and not necessarily money (Black's Law Dictionary, 3rd ed., p. 1432; Webster's New Twentieth Century Dictionary Unabridged, 2nd ed., p. 1434).

The law is clear that a construction of a contract which would make it reasonable, fair and just is preferred to one that, though equally consistent with the language, would make the contract unreasonable and

unfair (*Cohn v. Cohn*, 20 Cal. 2d 65, 123 P. 2d 833 (1942)). The well-established rules of construction of agreements provide that an interpretation must not be given the LPA which would involve an absurdity (*Golden v. Fischer*, 27 Cal. App. 271, 149 Pac. 797 (1915)).

It is submitted that the only construction that would make the LPA reasonable, fair, just and operative and would not involve an absurdity would be one which allowed Lifetime to effect a sale to a third party for credit. To adopt a construction which would not allow Lifetime to effect a sale for credit would be to controvert the well-expressed intention of the LPA that the parties were to share in the entire transaction on a pro-rata basis. It must be remembered that Lifetime had a percentage interest in the loans and would also stand to lose if did Jefferson.

V.

The Court Below Determined That Because of Its Conduct and Statements to Jefferson Pertaining to the Five Properties, Lifetime Became Indebted to Jefferson in the Amount of \$23,324.36 and Judgment in This Amount Should Be Affirmed.

The 15th and 16th Findings of Fact [C. T. p. 208, line 27, to p. 209, line 9] and the 9th Conclusion of Law [C. T. p. 211, lines 4-7] very clearly indicate the Court's finding that because of its conduct and statements to Jefferson with respect to the subject five properties, Lifetime has become indebted to Jefferson in the amount of \$23,324.36 and this is the amount of the judgment of the Court below plus interest [C. T. p. 213, lines 29-31].

In a footnote to page 15 of its brief, the plaintiff attempts to show that Lifetime's statement to Jefferson that it would receive 75% of the net sale proceeds of \$31,099.15 "was almost certainly a misstatement of its true intent . . .". Such is, of course, completely speculative and completely unsupported by the evidence adduced at the trial.

In fact, defendant's Exhibit A consists of four letters all of which were similar and which were sent to different Savings & Loan Associations concerning the same transaction and all of them stated that the addressee would receive 75% of a certain figure which was proportionately the same as for Jefferson. Thus it is easily seen that the position of the defendant has been consistent with respect to what was intended.

Even more importantly, as the Court below properly pointed out, the defendant is estopped to claim any sum in connection with the subject five properties greater than \$23,324.36 [C. T. p. 208, line 32, to p. 209, line 9].

In this transaction the laws of the State of California were specified to be applicable to the interpretation of the LPA and to any right or liability arising under it [C. T. p. 9, par. 21].

The law in the State of California is well settled to the effect that a party is bound by recitals of documentary evidence introduced by him.

Dodds v. Stellar, 77 Cal. App. 2d 411, 175 P. 2d 607 (1947).

The case of *Davenport v. Stratton*, 24 Cal. 2d 232, 240 (1944), 149 P. 2d 4 cited by plaintiff actually supports the position of the defendant. It was a situation where the defendant introduced into evidence with-

out objection a written statement which purported to show the amount due under a lease. Thereafter the defendant attempted to impeach his own exhibit and the court there said "This exhibit having been introduced in evidence by the defendant he is bound by its provisions."

A more recent case is that of *Harrold v. Harrold*, 100 Cal. App. 2d 601, 224 P. 2d 66 (1950), where the plaintiff introduced into evidence a financial statement of the defendant which had been prepared by the defendant and then attempted to show that it was not correct. The Court there held that the plaintiff was bound by the evidence disclosed therein and could not later be allowed to contradict or impeach the same.

In another case the court held that a party who introduces documentary evidence is not allowed to impeach or contradict it but is bound by its recitals *for all purposes* (emphasis added).

Kent v. First Trust and Savings Bank of Pasadena, 101 Cal. App. 2d 361, 225 P. 2d 625 (1950).

The most recent case on the subject in the State of California appears to be *Jackson v. Donovan*, 215 Cal. App. 2d 685, 30 Cal. Rptr. 755, 758 (1963), where the Court held that where the plaintiff introduced a document in evidence he thereafter could not impeach or contradict it where there was no fraud involved.

Another analogous case is that of *Nicola-Neppach Co. v. Smith*, 154 Or. 450, 58 P. 2d 1016, 60 P. 2d 979, 107 A.L.R. 1124, where it was held that a party who introduces in evidence a deposition of a receiver of a corporation as to the value of its assets is bound by the statements therein.

It also is clear that one who introduces a document is bound by its recitals in the sense that he is not allowed to impeach or contradict it or to accept a part which is in his favor and repudiate another part which is opposed to his claim.

Snell Isle v. Commissioner (CA 5), 90 F. 2d 481 Cert. Den. 302 U.S. 734, 82 L. Ed. 568, 58 S. Ct. 120.

In the instant case the plaintiff introduced Exhibit 11 into evidence without objection and relied on that exhibit in defining Lifetime's duties, to it. Therefore, it is clear that under applicable California law it cannot accept only a part of the exhibit and reject another part which is detrimental to its position.

There is no evidence in the record to the effect that Jefferson at any time disagreed with or disputed the amount set forth in Exhibit 11 by Lifetime as being due to Jefferson and plaintiff has not sought to suggest that it ever disagreed with the stated amount.

Early in the trial the Court below indicated that if it determined that the plaintiff was entitled to be paid back an amount on the LPA it was going to have to have some basis on which to work. In fact, the Court stated "I don't know how you can come in and say, 'we are entitled to the return of all of our money' when the property wasn't worth that much money. You might be entitled to the return of the reasonable value of the property." [R. T. p. 188, line 24, to p. 189, line 10].

However, despite this admonition by the Court the plaintiff brought forth no evidence as to the reasonable value of the five subject properties other than the

figure of "\$23,324.36" contained in plaintiff's Exhibit 11.

The burden of proving damages was upon the plaintiff.

Tremmeroli v. Austin Trailer Equip. Co., 102 Cal. App. 2d 464, 227 P. 2d 923 (1951).

If Lifetime were forced to make a cash payment of 75% of the long-term sales price the effect would be to give Jefferson a profit on the entire transaction whereas all the evidence is that there was a considerable loss on the overall transaction.

Mr. Weinstein, trial counsel for the plaintiff, indicated on various occasions that the plaintiff was not seeking any profit.

In his closing argument he stated:

"We are willing to take our shellacking if there has to be one. This is not a sour grapes situation. This is not a case in which we want to earn a profit. We know it is a loss situation. We knew what property this was when we bought it and we knew this was a transition area.

We took this risk voluntarily. We are not asking for any special interpretation. We are not asking for any favors." [R. T. p. 500, lines 9-17].

Later in final argument he went on to state:

"I think this probably can be resolved without doing any great harm to anyone except my client. My client is going to suffer whether your Honor gives us a total victory or total loss. Because if your Honor says we are right and the agreement must be construed as we contend, that property is going

to be disposed of, Your Honor, and it is going to be disposed of at a loss. We are expecting a loss. We hope there won't be any but we are ready to accept it. As I mentioned before, we are big boys. We entered this agreement and all we want are the rights under that agreement as these very parties before us have interpreted it." [R. T. p. 505, line 21, to p. 506, line 8].

Jefferson's total interest in the properties was \$32,-974.61 [R. T. p. 492, line 1]. In this appeal Jefferson is asking for 75% of the total sales price or \$37,087.50 which would be a profit to it of over \$4,000.00 on the overall transaction. Such can hardly be said to be consistent with the statement of counsel for the plaintiff before the Court below that his client did not want a profit but was willing to take its loss.

It should also be noted that the Court below stated that it was not taking as the basis of its judgment the prices which were set forth in Exhibit A pertaining to the subject properties [R. T. p. 531, lines 9-11].

VI.

Conclusion.

For the foregoing reasons Lifetime respectfully submits that the judgment of the trial court as to Count II should be affirmed.

Respectfully submitted,

WEITKAMP, RIDDLE & BEDROSIAN,

By FREDRICK J. WEITKAMP,

Attorneys for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FREDRICK J. WEITKAMP

No. 21809

IN THE

United States Court of Appeals

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vs.

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APPELLANT'S REPLY BRIEF.

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WM. B. LUCK, CLERK

McKENNA & FITTING,

427 West Fifth Street,
Los Angeles, Calif. 90013,

Attorneys for Appellant.

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No. 21809

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JEFFERSON SAVINGS AND LOAN ASSOCIATION,

Appellant,

vs.

LIFETIME SAVINGS AND LOAN ASSOCIATION,

Appellee.

APPELLANT'S REPLY BRIEF.

I.

SUMMARY OF ARGUMENT.

The position of appellant Jefferson Savings and Loan Association ("Jefferson"), briefly stated, is as follows: The District Court found that under the terms of the Loan Participation Agreement ("LPA"), when Lifetime Savings and Loan Association ("Lifetime") sold, without Jefferson's consent, properties subject to the LPA acquired through foreclosure, Jefferson was entitled to an immediate payment of 75% of the selling price less a pro rata share of the costs and expenses of sale—*i.e.*, "75% of the net sales proceeds obtained for such property by Lifetime." [C. T. p. 213, lines 25-26]. Since Lifetime sold, without Jefferson's written consent, the five properties involved in Count II of the Complaint which were subject to the LPA and which had been acquired through foreclosure, Jefferson was

entitled to an immediate payment of 75% of the selling price of \$37,087.50 less costs and expenses of sale of \$325.85, or \$31,099.15.

The District Court, however, arbitrarily and without justification awarded Jefferson not 75% of the selling price of \$37,087.50 but, rather, 75% of \$31,099.15—i.e., 75% of 75% of the selling price. The explanation for this anomalous decision is found in the following finding:

“16. On August 25, 1964, Lifetime stated to Jefferson in writing that the latter would receive 75% of \$31,099.15 in connection with the subject five (5) loans in the event that the Durhams took advantage of the 90 day purchase price on the eleven parcel agreement (Exhibit 11 in evidence). *By reason of the fact that Jefferson introduced Exhibit 11 in evidence, it is deemed to have relied upon the statements made therein as defining Lifetime's duties to it. Accordingly, since Jefferson did not at any time communicate to Lifetime its disagreement with the amount set forth in the last line of Exhibit 11, Jefferson is estopped to claim any sum in connection with the sale of the subject five (5) properties greater than 75% of \$31,099.15, or \$23,324.36.*” [C. T. p. 208, line 32, to p. 209, line 9; emphasis added].

Jefferson believes that the District Court's finding that it is “estopped” because of something upon which it supposedly relied is erroneous, and wholly unsupported by any evidence, and that the judgment should be modified to increase its award to 75% of the selling price of \$37,087.50, less its pro rata share of the costs and expenses of sale, or \$31,099.15.

In attacking Jefferson's position, Lifetime advances four basic contentions:

(1) That in finding that Jefferson was "entitled to an immediate payment of 75% of the *net sales proceeds* . . . obtained for such property by Lifetime" when Lifetime sold, without Jefferson's consent, properties subject to the LPA acquired through foreclosure, the District Court did not, in fact, mean that Jefferson was entitled to the payment of 75% of the selling price, less a pro rata share of the costs and expenses of sale (Appellee's Brief, pp. 3-4);

(2) That the District Court intended for its interpretation of the LPA to apply only *in futuro* and not to the existing controversy stemming from the parties' disagreement as to the meaning of the LPA which was the subject of Count II (Appellee's Brief, pp. 6-7);

(3) That the basis for the District Court's decision was an estoppel against Lifetime (Appellee's Brief, pp. 11-12);

(4) That because Jefferson introduced Exhibit 11 into evidence, it is estopped to controvert its terms (Appellee's Brief, pp. 12-16).

Jefferson submits that none of these arguments are valid.¹

¹Significantly absent from Lifetime's treatment of these arguments is any substantial effort to predicate them upon the evidence before the District Court. Rather, Lifetime takes a bootstrap approach in which it strains to discover discrepancies between Appellant's argument before the District Court and its position on this appeal. As Appellant demonstrates hereafter, such alleged discrepancies have absolutely no bearing upon the disposition of the issues with which this Court is presented.

II. ARGUMENT.

1. Lifetime's Purported Distinction Between "Selling Price" and "Net Proceeds of Sale" Is Untenable.

There are several answers to Lifetime's contention that the District Court did not really mean that the LPA required Lifetime to pay Jefferson 75% of the sales price when it sold foreclosed properties without securing Jefferson's written consent.

The first is that it is inconsistent with the specific language that the Court used—language which, incidentally, Lifetime approved as to form [C. T. p. 211, lines 22-26]. If the District Court meant that Jefferson was to receive merely a pro rata share of the note when that note constituted the "net proceeds of sale", certainly it would have used a term such as "transfer" or "assign". It did not do so. Instead, it used the word "payment", and the conclusion that the word in this context contemplates money is inescapable. If the District Court was contemplating the possible situation in which Lifetime received both a note and cash and it was intended that the payment was to be of 75% of the cash only, presumably it would have so indicated by modifying "net proceeds" with an appropriate adjective, such as "any". No such modification is present.

Second, the term "net proceeds" was used by *Lifetime* to refer to the amount due to Jefferson on a *credit* sale of foreclosed property subject to the LPA. In a transaction related to and substantially contemporaneous with the sale of the five properties which are the subject of Count II, Lifetime sold—for an amount less than its and Jefferson's investment therein—three foreclosed properties subject to the LPA. The sole consideration which it received was a promissory note and deed of trust securing payment of the note [R. T. p.

73, lines 4-24; p. 117, line 25, to p. 119, line 7; Ex. 8]. Lifetime's remission of 75% of the sales price to Jefferson was accompanied by a statement [Ex. 14] which described the sales price (less certain costs and expenses of sale) as the "Net Proceeds" of the sale and the amount remitted to Jefferson as "75% of Net Proceeds". Hence, "75% of net proceeds" was, according to Lifetime's own terminology, 75% of the *selling price*.²

Finally, the construction of the "net proceeds" provision advanced by Lifetime would be anomalous in relation to other provisions of the LPA as interpreted by the District Court. The District Court delineated in great detail the rights and duties of Jefferson and Lifetime under the LPA. It expressly found that:

"5. By virtue of the terms and provisions of the LPA and their respective status as tenants in common, *Lifetime must obtain the written consent of Jefferson* to the terms of sale before Lifetime can sell or otherwise dispose of any real property which had formerly secured the payment of any loan included within the LPA and which had been acquired through foreclosure proceedings by Lifetime pursuant to the terms and provisions of the LPA." [C. T. p. 213, lines 13-19; emphasis added]; and that:

"6. *In the event that Lifetime sells or otherwise disposes of any real property* which had for-

²Furthermore, this pay-off demonstrates that Appellee Lifetime interpreted the LPA precisely in the same way as the District Court interpreted it—that when Lifetime sold foreclosed properties subject to the LPA, whether for cash or credit, without Jefferson's written consent it was required to pay over to Jefferson its pro rata share of the net sales proceeds. Lifetime argued before the District Court that in making this payment to Jefferson, it was merely exercising its right under Paragraph 13 of the LPA to "repurchase" Jefferson's participation interest. [R. T. p. 474, line 21, to p. 478, line 14]. But if this was the case obviously such a "repurchase" would have to be at "book value"—not, as it was here, at a lower sale price.

merly secured the payment of any loan included within the LPA and which property had been acquired through foreclosure proceedings by Lifetime pursuant to the terms and provisions of the LPA, *without the written consent of Jefferson, Jefferson is entitled to an immediate payment of 75% of the net sales proceeds obtained for such property by Lifetime.*" [C. T. p. 213, lines 20-26; emphasis added].

Yet under the construction of the District Court's judgment advanced by Lifetime, Lifetime's obligation to Jefferson would be precisely the same whether Lifetime secured Jefferson's written consent to the sale of foreclosed properties, as required by the LPA, or failed to do so. There is no question, as the District Court specifically found, that when Lifetime forecloses upon real estate subject to the LPA, Jefferson is a pro rata owner of the property thus acquired [C. T. p. 210, lines 15-19]; and that when Lifetime sells foreclosed property *with* Jefferson's consent, Jefferson is a pro rata owner of any note and deed of trust received therefor and entitled to share in the payments thereon [R. T. p. 480, lines 1-4; p. 489, lines 18-20]. Under Lifetime's view of the District Court's interpretation of the LPA, how would the rights and duties of the parties with respect to each other be any different when Lifetime sold the property *without* securing Jefferson's consent? Obviously not at all. If payment of 75% of "net proceeds" meant only that Jefferson should receive an assignment of a 75% interest in the note and deed of trust, it would mean nothing because Jefferson already has its pro rata share of the note and deed of trust. If it meant that Jefferson was to receive 75% of any cash received for the property, it would also mean nothing because Jefferson is entitled to that, too, regardless of whether it has consented to the sale.

2. Lifetime's Contention That the Interpretation Placed Upon the LPA by Lifetime Was to Operate Only in Futuro Is Plainly Erroneous.

Lifetime's argument that the Court's declaration as to the meaning of the LPA was intended to be confined to future transactions and not to the subject matter of Count II rests upon three bases: (1) that the Court's judgment on Count I uses the future tense; (2) that the findings and judgment on Count I are based upon the "particular facts" pertaining to the sale of the five properties which are the subject of Count II, and "these [facts] are not involved in Count I"; and (3) that Jefferson's counsel made statements indicating that he did not intend for the LPA, as interpreted by the Court, to be applicable to Count II (Appellee's Brief, pp. 6-8). Upon analysis, it becomes apparent that none of the foregoing, either individually or cumulatively, support Lifetime's position.

With respect to the point that the District Court used the future tense in Count I—a point on which it places primary emphasis—Jefferson respectfully submits that even if this was the case, the significance of such usage would be dubious. But the fact of the matter is that the District Court did not do so: the statement quoted by Lifetime as being in the future tense, "In the event that Lifetime sells or otherwise disposes of any real property . . .", is, in fact, clearly in the present tense.

So far as the court's reference to the "particular facts" in its findings and judgment on Count II is concerned, such a reference is irrelevant to the issue of whether the interpretation of the LPA in Count I is applicable to Count II. Count II was a claim for dam-

ages for breach of the LPA. Obviously, in order to adjudicate the claim it was necessary for the Court to find the "particular facts" to sustain it. Such findings would be required no matter what the court decided the LPA as it applied to Count II meant.

Actually, the findings reveal that the District Court did not exclude Count II from the application of the LPA as interpreted in Count I. In its judgment on Count I, the Court found:

"6. In the event that Lifetime sells or otherwise disposes of any real property which had formerly secured the payment of any loan included within the LPA and which property had been acquired through foreclosure proceedings by Lifetime pursuant to the terms and provisions of the LPA, without the written consent of Jefferson, Jefferson is entitled to an immediate payment of 75% of the net sales proceeds obtained for such property by Lifetime." [C. T. p. 213, lines 20-26].

In its findings with respect to the subject matter of Count II, the Court found:

"14. On or after August 6, 1964, Lifetime, *without attempting to obtain or otherwise securing the consent of Jefferson*, also entered into a written agreement with David and Alberta Durham wherein Lifetime agreed to sell and convey to the Durhams five parcels of real property which had formerly secured the subject five (5) loans . . ." [C. T. p. 208, lines 11-15; emphasis added].

The absence of Jefferson's consent is relevant only because the Court in Count I found that a sale without such consent required Lifetime to pay off Jefferson.

Hence, not only do the findings fail to support Lifetime's position, they clearly controvert it.

Lastly, Lifetime relies upon a statement made by Jefferson's counsel which Lifetime characterizes as indicating that "Count I only pertains to the rights and duties of the parties in the future". (Appellee's Brief, p. 7).

Jefferson submits that Lifetime's description of the statement made by its counsel is misleading. At most, Jefferson's counsel indicated in its closing argument a recognition that the interpretation previously placed upon the LPA by the parties might not be binding as to future transactions—not, as Lifetime claims, that the interpretation placed upon the LPA by the Court was in no event to apply to Count II [R. T. p. 435, line 24, to p. 436, line 22]. In fact, Jefferson's counsel expressly indicated that the interpretation theretofore placed upon the LPA by the parties was proper, and was the interpretation which the Court should place upon it under Count I:

"As your Honor will be able to tell from any argument, we are willing to accept the construction Lifetime placed upon the contract during the course of the contract, because that construction is the one and the same which we have always, Jefferson has always placed upon that contract." [R. T. p. 435, lines 18-23].

But even if Lifetime's characterization of the statement of counsel for Jefferson was accurate, it would still not support Lifetime's claim. What is controlling is not what either Lifetime's counsel or Jefferson's counsel *thought* the Court should decide; rather, it is

what the Court *did* decide. Here, it is evident from an examination of the findings and judgment that the Court decided that the LPA required Lifetime to secure Jefferson's written consent to the sale of foreclosed real estate; and when it failed to secure such consent, as it did with respect to the five properties involved in Count II, Jefferson was entitled to an immediate pay-off. The matter is as simple as that.

Consequently, the extensive argument which Appellee Lifetime devotes to controverting the interpretation placed upon the LPA by the District Court (Appellee's Brief, pp. 8-11) is irrelevant to the disposition of this appeal. If Lifetime felt that the District Court's judgment as to the interpretation of the LPA was incorrect, it should have appealed from that judgment. It did not do so. A reexamination on the appeal of the correctness of the District Court's interpretation of the LPA is therefore *foreclosed*. *Schildhaus v. Moe*, 319 F. 2d 587, 588 (2d Cir. 1963); *Hall v. Keller*, 180 F. 2d 753, 755 (5th Cir. 1950), cert. den. 340 U.S. 818; *Blackhurst v. Johnson*, 72 F. 2d 644, 649 (8th Cir. 1934).

3. The Basis for the Action of the District Court in Awarding Jefferson Judgment on Count II Was Not an Estoppel Against Lifetime.

Lifetime apparently realizes that in order to give its position any credibility and avoid the fact that the basis for the decision of the District Court on Count II was breach of the LPA as interpreted in Count I, it must find an alternative basis for the Court's decision on Count II. The basis which it puts forth is estoppel: "[B]ecause of its conduct and statements to Jefferson with respect to the subject five properties, Lifetime has

become indebted to Jefferson in the amount of \$23,324.36 . . .". (Appellee's Brief, pp. 11-12).³

Perhaps the evidence before the District Court would have supported a judgment for Jefferson based upon estoppel. But to attribute the decision in favor of Jefferson on Count II actually reached by the Court to estoppel is only wishful thinking on Appellee's part. Estoppel was indeed involved in the Court's reasoning. But it was an estoppel *against Jefferson limiting Jefferson's recovery*:

"By reason of the fact that Jefferson introduced Exhibit 11 in evidence, it is deemed to have relied upon the statements made therein as defining Lifetime's duties to it. Accordingly, since Jefferson did not at any time communicate to Lifetime its disagreement with the amount set forth in the last line of Exhibit 11, *Jefferson is estopped to claim any sum in connection with the sale of the subject five (5) properties greater than 75% of \$31,099.15, or \$23,324.36. Seventy-five percent (75%) of the sale price to the Durhams was \$37,087.50 and 75% of the cost and expenses of that sale were approximately \$325.85.*" [C. T. p. 209, lines 3-11; emphasis added].

³Indicative of the weight placed upon the argument by Lifetime is its statement that "in order for it [Jefferson] to prevail in this appeal it must attack finding 16 of the Findings of Fact and Conclusions of Law which stated that Jefferson is deemed to have relied upon the statements made in Exhibit 11 in defining Lifetime's duties to it on the ground that there is not any substantial evidence to sustain it" (Appellee's Brief, p. 5). The statement is grossly misleading because, as indicated herein, it paraphrases only the first sentence of the finding and not the balance in which the District Court concluded that because of such reliance, *Jefferson* was estopped to claim more than the amount stated in the letter.

Hence, in Jefferson's view, the dispositive issue before the Court is whether in fact Jefferson is estopped to claim more than the \$23,324.36 figure. The question is discussed at length in Jefferson's opening brief, at pages 13-19.

4. Jefferson Is Not Estopped to Contradict the Recital in Exhibit 11 That It Would Receive 75% of \$31,099.15 by Reason of the Fact That It Introduced Exhibit 11 Into Evidence.

Lifetime, apparently recognizing the absurdity of estopping a party because of something upon which *that party* relied, attempts to base the estoppel upon the fact that Jefferson introduced into evidence the letter containing the "75% of \$31,099.15" reference. It cites a number of California cases to support its contention that Jefferson is "bound" by the recital as to the amount of the indebtedness and cannot contradict it. The reference to California authority in this Court is rationalized with the statement that "the laws of the State of California were specified to be applicable to the interpretation of the LPA and to any right or liability arising under it." (Appellee's Brief, p. 12).

Appellants frankly have grave doubts that Lifetime's position would be well taken even under California law. Thus, in one of the very cases which Lifetime cites in support of its position, *Dodds v. Stellar*, 77 Cal. App. 2d 411, 419-420 (1946), the rule was not applied. The Court in *Dodds* said:

"Appellant invokes the rule that a party is bound by the recitals of documentary evidence introduced by him. [Citations] He then proceeds to demonstrate that certain statements in the work 'X-rays

and Radium in the Treatment of the Skin,' by McKee, introduced in evidence by respondent, are inconsistent with the diagnoses of the witnesses. The elaborate argument to illustrate the hopelessness of respondent's position by showing the inconsistencies between McKee's discussion of the symptoms of a third degree X-ray burn and the medical testimony is interesting but not convincing. *It was the privilege if not the duty of respondent's counsel to offer in evidence the entire McKee volume at the time of reading any part of it.* Conceding, arguendo, that it contains language contradictory of the expert witnesses, it is a rule governing appeals that where there is a conflict between the witnesses presented by a party or any inconsistency between his living witnesses and his documents, or between inferences drawn from the facts proved by either, the jury are at liberty to chose the writing or the witness or the inference upon which they will base their finding."

But in any event, the California rule is inapplicable to this case. A federal court is not required to apply state rules of procedure in a diversity case. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). A rule is procedural when it merely regulates the means by which the rights of the parties to the litigation are ascertained. *Guarantee Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945). Under this criteria, whether or not a party is bound by the recitals in a document which he introduces is obviously a matter of procedure.⁴

⁴It is true, of course, that a federal court may look to state rules of procedure for guidance. But here it is clearly inap-
(This footnote is continued on the next page)

The recent opinion of this Court in *Jerrold Electronics Corp. v. Wescoast Broadcasting Co.*, 341 F. 2d 653, 666 (9th Cir. 1965), *cert. den.* 382 U.S. 817, would seem to be a complete answer to Lifetime's contention that Jefferson is irrevocably "bound" by the recital in Exhibit 11 as to the amount that Jefferson would receive:

"In making its case the plaintiff introduced voluminous correspondence and other documents exchanged by or written by the defendants or some of the persons collaborating with them. Some portions of this correspondence contained statements contrary to the allegations of the plaintiff's complaint, and the contentions made by it in pretrial order. It is contended that because this evidence was offered by the plaintiff these various contradictory statements are binding upon the plaintiff. *We know of no such rule. To the extent that documents originally designed to serve the defendants and their purposes also contain statements which support the claims of the plaintiff, the plaintiff may rely thereon without having to accept as verity all that appears in such documents.*"

appropriate to do so. The rule that a party is "bound" by recitals in documents which he introduces is a corollary of the doctrine that a party vouches for the credibility of his witnesses and therefore may not impeach them. That doctrine has little in the way of reason to commend it. As stated by the Third Circuit in *Johnson v. Baltimore & O. R. Co.*, 208 F. 2d 633, 635, quoting from 3 Wigmore on Evidence, 383, 389 (3d Ed. 1940), "There is no substantial reason for preserving this rule [that a party may not impeach his witness],—the remnant of a primitive notion." It is totally incompatible with the philosophy of the Federal Rules of Civil Procedure which, as evidenced by Rule 43, condemns artificial impediments to the ascertainment of truth. Furthermore, California itself has manifested its dissatisfaction with the doctrine by abolishing it. Under § 785 of the Evidence Code which became effective January 1, 1967, "The credibility of a witness may be attacked or supported by any party *including the party calling him.*" (Emphasis added).

The appellee here is making precisely the same argument that this Court rejected in the *Jerrold Electronics* case. It is contending that Jefferson is estopped to question the recital in a document originally designed to serve the defendant's purposes because it introduced that document into evidence. This Court has found that argument untenable.

It is clear that at no time did Jefferson accept the \$31,099.15 figure as correct. The figure as it appears on Exhibit 11 is circled and marked with a question mark [Ex. 11]. Jefferson prayed in its complaint for damages of \$37,087.50, which is 75% of the selling price of the properties less Jefferson's pro rata share of the costs and expenses of sale [C. T. p. 6, lines 14-16]. At the trial it introduced evidence of prior transactions which showed that 75% of the selling price was the proper measure of its recovery under Count II [Ex. 14]. Lifetime's own counsel recognized that Jefferson was not seeking a recovery of \$31,099.15 but, rather of \$37,087.50 [R. T. p. 492, lines 13-17].

5. Whether or Not Jefferson Will Realize a "Profit" on the Sale of the Different Properties Subject to Count II Is Irrelevant.

Lifetime devotes the last two pages of its brief to showing that Jefferson will make a "profit" with respect to the subject matter of Count II if it is awarded the recovery which it claims (Appellee's Brief, pp. 15-16).

Jefferson submits that what it is seeking here is its rights under the terms of the LPA. Whether those

rights mean that Jefferson will receive an amount in excess of its investment or an amount less than its investment is immaterial. Lifetime had no qualms about paying Jefferson an amount less than its investment in foreclosed properties subject to the LPA when the sales price was less than the amount of the investment [Ex. 14]. Neither should it object to paying Jefferson an amount more than its investment when the sales price is more than the investment.⁵

Indeed, if there is any element of unconscionability or overreaching with regard to the LPA, it is on the part of Lifetime. Despite the fact that the loans in which Jefferson purchased a participating interest bore interest at rates varying from 7.2% to 7.8%, Jefferson's rate of return was limited to 6.5%. The difference between the 6.5% and the actual rate of interest went to Lifetime even though Lifetime had only a 25% interest in the loan. [C. T. pp. 7-11]. As a result, Lifetime's rate of return on its investment was in excess of 11%.⁶ In addition, Lifetime received all late charges, all of certain miscellaneous fees, and an additional fee of 5% on all rentals collected by Lifetime on the mortgaged premises.

⁵Under the terms of the sale there was a lower "short term" price and a higher "long term" price, depending on the time that the buyers took to pay off their loan (Appellee's Opening Brief, pp. 6-7). Jefferson is claiming only the lower "short term" price.

⁶A calculation based upon Exhibit 14 reveals that the total unpaid principal balance on the loans subject to the LPA was \$477,657.22. The total annual interest on this sum was \$37,015.91, of which Jefferson, for its \$358,242.92 share, received \$23,285.79 while the balance, \$13,730.12, went to Lifetime for its \$119,408.30 share.

III.

CONCLUSION.

It is evident that the District Court was in error in limiting Jefferson's recovery under Count II to \$31,099.15. This Court should amend the judgment to increase Jefferson's award to the amount provided for by the LPA, 75% of the net sales proceeds of the five properties in question.

Respectfully submitted,

McKENNA & FITTING,

By AARON M. PECK,

Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

AARON M. PECK

No. 21809

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APPELLANT'S PETITION FOR REHEARING.

McKENNA & FITTING,

LES J. WEINSTEIN,

AARON M. PECK,

427 West Fifth Street,
Los Angeles, Calif. 90013,

Attorneys for Appellant.

FILED

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APPELLANT'S PETITION FOR REHEARING.

To the Honorable Frederick G. Hamley, James M. Carter, and Russell E. Smith:

Jefferson Savings and Loan Association ("Jefferson"), Appellant in the within Appeal, respectfully petitions this Court pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit to grant a rehearing in order to reconsider its judgment in the within Appeal, rendered on June 6, 1968.

The judgment of this Court, which increased the sum awarded to Jefferson by the District Court from \$23,324.36 to \$31,099.15, rests upon general trust principles. While Jefferson does not dispute the correctness of the Court's analysis *per se*, it respectfully submits that the decision improperly limits Jefferson's recovery. Under the terms of the written contract (the "LPA") governing the respective rights and duties of Jefferson and the appellee herein, Lifetime Savings and Loan

Association ("Lifetime"), with respect to the five properties in question, *as understood and interpreted by the parties*, including Lifetime [see Findings of Fact 12 and 13, C. T. p. 207, line 27, to p. 208, line 10] and *as construed by the District Court* [C. T. p. 213, lines 20-26], Jefferson is entitled to recover from Lifetime 75% of the selling price of the five properties, \$37,087.50,¹ less costs and expenses of sale of \$325.85, or \$36,761.65.

The District Court found—and Lifetime did not appeal from this portion of the judgment or question its counterpart in the conclusions of law—that:

"In the event that Lifetime sells or otherwise disposes of any real property which had formerly secured the payment of any loan included within the LPA and which property had been acquired through foreclosure proceedings by Lifetime pursuant to the terms and provisions of the LPA, without the written consent of Jefferson, *Jefferson is entitled to an immediate payment of 75% of the net sales proceeds obtained for such property by Lifetime.*" [C. T. p. 210, lines 26-31 (comma between "LPA" and "without" omitted); p. 213, lines 20-26; emphasis added].²

This Court failed to award Jefferson 75% of the net credit price of the five properties because of its view that "net proceeds" of sale was something other than

¹The selling price of the five properties was \$49,450.00.

²The District Court limited Jefferson's award to 75% of 75% of the so-called "ninety day price" of the subject properties only because it was laboring under what this Court recognized to be an erroneous conception of the doctrine of estoppel. (Opinion, pp. 3-4).

“net selling price.” (Opinion, pp. 4-5).³ This view is incorrect.

The judgment of the District Court gave effect to the understanding of the parties themselves as to their respective rights and duties under the LPA; and the term “net proceeds” was used and understood by *Lifetime itself* to refer to the amount due to Jefferson on a *credit* sale of foreclosed property. In a transaction directly related to and substantially contemporaneous with the sale of the five properties in question, Lifetime sold, to the same purchaser, David and Alberta Durham, three other foreclosed properties subject to the LPA. The sole consideration which Lifetime received in that related transaction was a promissory note and deed of trust securing payment of the note [R. T. p. 73, lines 14-24; p. 117, line 25, to p. 119, line 7; Ex. 8]. Lifetime’s remitted 75% of the net sales price to Jefferson. The remission was accompanied by Lifetime’s statement [Ex. 14] to Jefferson, which described the sales price (less certain costs and expenses of sale) as the “Net Proceeds” of the sale and the amount remitted to Jefferson as “75% of Net Proceeds.”⁴ Hence, 75% of

³Since the “ninety day price” never became operative, the selling price of the properties in question was the so-called long-term, or credit, price.

⁴The entire transaction is recorded in Findings of Fact 12 and 13, the accuracy of which is undisputed:

“12. On or after August 6, 1964, Lifetime entered into a written agreement with David and Alberta Durham wherein Lifetime agreed to sell and convey to the Durhams those three parcels of real property which had formerly secured loans 479, 480 and 481, and in consideration therefor, the Durhams agreed to give to Lifetime their promissory note in

(This footnote is continued on the next page)

the net proceeds was, *according to Lifetime's own understanding, terminology, and conduct* 75% of the selling price.

In summary, Jefferson respectfully submits that the terms of the LPA compel an award to Jefferson of \$36,761.65.

McKENNA & FITTING,
LES J. WEINSTEIN,
AARON M. PECK,
By AARON M. PECK,
Attorneys for Appellant.

the sum of \$70,000.00 and a first deed of trust on the three parcels. On or about August 19, 1964, the sale escrow was closed on this transaction and the conveyance and sale consummated. The aforementioned sale to the Durhams was consummated by Lifetime's furnishing to the Durhams 100% financing in the form of a \$60,000.00 loan together with a \$10,000.00 construction loan fund, the latter to be used by the Durhams to refurbish the three parcels of property. The total of said loan amounted to \$70,000.00.

"13. On or about August 25, 1964, Lifetime paid to Jefferson 75% of the net sales price received from the Durhams in connection with the sale of the real property which had formerly secured Loans 479, 480 and 481, which sum amounted to \$45,092.80." [C. T. p. 207, line 27, to p. 208, line 10]. The excess over 75% of \$60,000 is accounted for by the proceeds of an insurance claim for damage to the property [Ex. 14].

Certificate.

I certify that in my judgment the within Petition is well-founded and is not interposed for delay.

AARON M. PECK

NO. 22118-A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGELUS FUNERAL HOME,

Petitioner,

vs.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

ON PETITION TO REVIEW A DECISION
OF THE
TAX COURT OF THE UNITED STATES

PETITION FOR REHEARING
BY
TAXPAYER-PETITIONER

LEO BRANTON, JR.
3450 Wilshire Boulevard
Suite 1107
Los Angeles, California 90005
385-8031

WILLIAM B. MURRISH
3175 West Sixth Street
Suite 203
Los Angeles, California 90005
DU 5-6111

Attorneys for Taxpayer-Petitioner

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1969

NO. 2 2 1 1 8-A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGELUS FUNERAL HOME,

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Attorneys for Taxpayer-Petitioner

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGELUS FUNERAL HOME,

Petitioner,

vs.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

PETITION FOR REHEARING BY
TAXPAYER-PETITIONER

Taxpayer-Petitioner Angelus Funeral Home hereby respectfully petitions this Court for a rehearing to reconsider the judgment entered herein on February 10, 1969; rehearing and reconsideration is requested upon all of the grounds and considerations set forth below:

(1) In its decision this Court has ruled that conceding that the post-1961 pre-need funeral agreement form employed by Angelus created an enforceable trust, the power therein expressed permitting Angelus during the period of deposit to use the trust moneys for mortuary capital improvements or to acquire real property gave Angelus as trustee so substantial an "economic

benefit . . . that Angelus should be taxable on receipt of the payments notwithstanding . . . power [in] the beneficiaries . . . to enforce the trust terms under state law." (Slip Op. , p. 4.) Because of this, the Court found "applicable" the rule of "the capital improvement trust cases" (Slip Op. , p. 5) represented by the Mount Vernon, Gracelawn, Jefferson, Sherwood and National Memorial Park decisions, ^{1/} holding permanent funeral-plan trust funds dedicated in fee to mortuary capital improvements---as distinguished from similarly permanently-deposited funds dedicated permanently to individual lot maintenance and care for the lots of the individual depositors---constitute taxable income to the funeral-home-trustee at the time of receipt.

But a crucial circumstance distinguishes all of said cited cases from the case at bar; the cited cases---without exception---are trusts dedicating deposited funds to generalized mortuary "capital improvements" in fee. At bar, Angelus' trust limitation is not merely that it may use the deposited funds only for capital improvements or the acquisition of real property (either of which as to permanent deposit funds would be insufficient to avoid taxability under the said cited cases) but the vital further limitation

^{1/} Mount Vernon Gardens, Inc. v. Commissioner (C.A. 6, 1962) 298 F. 2d 712; Gracelawn Memorial Park, Inc. v. United States (C.A. 3, 1958) 260 F. 2d 328; Jefferson Memorial Gardens, Inc. v. Commissioner (C.A. 5, 1968) 390 F. 2d 161; Sherwood Memorial Gardens, Inc. v. Commissioner (C.A. 7, 1965) 350 F. 2d 225 and National Memorial Park v. Commissioner (C.A. 4, 1944) 145 F. 2d 1008, all cited in Slip Op. , pp. 4-5.

that it may not use the deposited funds for those or any other purposes in fee, but may use the funds for the provided purposes only during a temporary limited period of deposit and subject to---as this Court has conceded---an enforceable trust duty to restore the funds to the designee of the applicant on the applicant's death should death occur outside of Los Angeles County and in a place where funeral services by Angelus should be "[im]practicable." (Petr. Ex. 11, par. 7.)

This is a controlling distinction. All that Angelus at most may lawfully appropriate to capital improvement purposes under the post-1961 deposit agreements is the interim, temporary use-value of the trust moneys paid in by any individual applicant for as long as his trust agreement remains operative and until the same is terminated either by refund or by performance by Angelus at the time of the applicant's death. The funeral-home-trustees in the Mount Vernon and companion cited cases possessed express power to devote the trust moneys concerned in each of those cases to capital improvements in fee, and it was this broadly selfish power which those decisions held created taxability at the time of receipt to the funeral-home-trustee. At bar Angelus receives no moneys under the deposit agreements permanently or in fee, and the limited term of holding existed as a matter of enforceable state trust law, as this Court concedes. This means that California law would require safeguards in this as well as all other trust respects limiting Angelus to conduct in "uberrima fides". Further, it has been stipulated at bar that Angelus in

fact held funds on deposit in appropriate trust bank accounts not only adequate to fully insure performance of any demands for refunds which might arise but in fact equal to or exceeding the total amount of deposits under all of the post-1961 agreement deposit forms. (Joint Tax Court Exhibit 9-I, Schedule I.)

(2) Thus it is the circumstance that the trust moneys at bar must be held as an interim trust deposit---pending resolution of the trust by either refund or funeral-service performance by Angelus at the time of an applicant's death---which marks the difference between the instant case and the cited Mount Vernon decision and companion cited cases. Moreover, this Court has simultaneously declared at bar---and indeed it is the law of the case since the Commissioner on this score did not appeal---that the total appropriation to Angelus' own purposes and ends of the use-value of the trust moneys under the pre-1961 agreement forms, through Angelus' appropriation of the interest earned on the bank deposits of such funds, was not destructive of the nontaxability of the trust funds in Angelus' hand since such could be considered as no more in value than fair compensation to Angelus as trustee for administrative burdens. In sustaining Angelus' right to take the interest earned on the trust funds as the equal of trustee fees, the Court approves as to the pre-1961 deposit arrangements a total appropriation by Angelus of the interim use-value of the deposited trust moneys, because that is what "interest" is---compensation

for the temporary power or right to use money during a defined time-period.

If it was permissible, and did not alter the tax-immune status of Angelus as the trustee in the pre-1961 tax years for Angelus to appropriate totally the money interest earned upon the trust deposits, then it should not destroy such immunity as to the post-1961 tax years that Angelus has appropriated, or possessed power to appropriate, in a limited way (to invest only in prescribed ways) the same use-value of the same trust deposits during the same temporary interim period of trust holding.

(3) Moreover, for the temporary, limited "use-value" power granted to it under the post-1961 deposit forms, Angelus itself concededly pays the depositors an affirmative form of interest. As compensation for the interim power to invest in capital improvements or real property, and to induce depositors under the earlier forms to transfer to post-1961 deposit forms, Angelus under the post-1961 agreement forms pays each year to each depositor ten percent of the amount paid in by such depositor during such year. (Slip Op. , p. 3.)

It was precisely this feature of the payment of interest by the deposit-holder in the Clinton Hotel case (Clinton Hotel Realty Corp. v. Commissioner (C.A. 5, 1942) 128 F. 2d 968) which caused the Court to find that moneys advanced there as a deposit under a lease were distinguishable from moneys received under a plenary-use power and were sufficiently characterized as

security or deposit funds to make them nontaxable to the recipient at the time of receipt.

In disallowing the force of the Clinton Hotel decision and of Consolidated-Hammer Dry Plate & Film Co. v. Commissioner (C.A. 7, 1963) 317 F.2d 829, this Court points to Van Wagoner v. United States (C.A. 5, 1966) 368 F.2d 95, and Astor Holding Co. v. Commissioner (C.A. 5, 1943) 135 F.2d 47 as "more closely analogous to" the instant case. (Slip Op. , p. 6.) Both the Van Wagoner and the Astor Holding Co. decisions expressly note that in their respective premises, unlike the facts in Clinton, the power-holder "did not pay interest" on the challenged deposit-funds. (368 F.2d 95, 97, emphasis added; 135 F.2d 47, 48.)

(4) As this Court said (Slip Op. , p. 6) of the advance sales deposit payment in the Consolidated Hammer case, supra, the feature at bar which requires, by an enforceable trust duty, that Angelus hold the post-1961 contract deposits in trust as interim trust holdings, subject to a trust duty to refund the same at any time in any individual case upon the death of the depositor should death occur outside of Los Angeles County where funeral services by Angelus would be "impracticable" or should the next of kin request a transfer to another funeral company, or should the depositor before death request transfer or refund ^{2/}, gives the

^{2/} As noted in Petitioner's Opening Brief, p. 28. f.n. 6, the contingency of a duty of refund was a substantial one; the
(Continued)

deposited moneys "the attributes of a financing arrangement in the nature of a loan." (Slip Op. , p. 6, emphasis added; the language is taken by this Court from the Consolidated-Hammer decision, 317 F.2d 829 at p. 832.)

It is this duty---contingent but real ^{3/} ---to restore the trust moneys to the applicant or to the designee of his next of kin should refund be requested or required which makes the instant case truly analogous not to the Mount Vernon decision and like cases but to the rental-deposit, sales-advance-deposit, and option-deposit lines of decisions cited and developed in detail in petitioner's briefs.

A loan is concededly not income for taxation purposes, however free the borrower may be to employ the funds in the interim as he will. So, too, according to the lease, sale and option deposit cases cited by petitioner a "deposit" subject to a

^{2/} (Continued)

chance that the depositor might move from Los Angeles and die outside of the Los Angeles area and where funeral services by Angelus would be impracticable was a considerable contingency and one over which petitioner had no control; the contingency that the depositor might request a withdrawal prior to his death or that the next of kin after death might request a transfer of the funds to another funeral director arose not from the direct terms of the deposit forms but from petitioner's uniform and unvarying conduct and practice according to the uncontested testimony. (Rep. Tr. pp. 23-26; POB, p. 9, f.n. 4.) Consistent and unvarying conduct by the petitioner limiting its rights and powers as trustee would be, as noted in the briefs, particularly controlling under trust law since the trust document would in any event be construed most strictly against Angelus as the initiator and draftsman thereof. (Id.)

^{3/} See the comments in the footnote immediately above.

substantial, enforceable duty to account for and return the deposited funds after a holding period should a declared contingency take place, is equally not income in tax terms; and particularly is this the case where, as in the instant case, the interim holding, and the duty to hold for safe return, is made an express trust duty, not merely a contract duty, and where the power of the trustee to use or invest the funds during the holding interim is, as in the instant case, curtailed by substantial limitations safeguarding the content and value of the trust res and the ready capacity of the depositor to refund the same or any required part promptly should the contingency requiring refund occur.

(5) This Court's decision in the Mutual Telephone case (Mutual Telephone Co. v. United States (C.A. 9, 1953) 204 F.2d 160) directly illustrates the principle concerned at bar. There the taxpayer telephone company for a period of years held certain funds collected from subscribers subject to an order by the Hawaiian Public Utility Commission requiring that the funds be held as "Contributions to Telephone Plant" and not be finally disposed of in any other manner until further order. After a number of years of such holding, the Commission finally authorized the taxpayer to deposit the funds permanently in its employees' "Retirement System" fund---but the taxpayer was never given plenary freedom to use the funds as it might choose as in the case of true, ordinary income. This Court recognized the

distinction between the interim holding (though that holding was for a semi-selfish purpose, plant contribution) and the ultimate permanent holding of the taxpayer when it was permitted to deposit the funds into its employees' pension fund (still a limited purpose, but a selfish and now permanent purpose). This Court held the deposited moneys were not taxable income to the telephone company during the interim holding, but were taxable income to the company when it was finally permitted to deposit the same permanently in its employees' pension fund.

(6) The Court disallows (Slip Op. , p. 7) the sales-of-goods cases cited by petitioner (Veenstra & De Haan Coal Co. (1948) 11 T. C. 964 and Woodlawn Park Cemetery Co. v. Commissioner (1951) 16 T. C. 1067) by inferring that Angelus was obligated under the post-1961 deposits only to furnish funeral services and not to furnish and sell a casket; the Court infers this limitation from an interpretation only of the word "use" in the post-1961 deposit forms. (Petr's Ex. 11.) But this overemphasizes the single word isolated thus by the Court and ignores the uncontradicted record testimony of the practice of the parties to all such agreements in all cases to include the sale and furnishing of a casket with the furnishing of funeral services, and as a part thereof, the casket to be valued at one-half of the total sum payable to Angelus in the absence of more specific instructions or choices by the applicant or the next of kin. (Rep. Tr. , pp. 25-27.) Thus the sale-of-goods cases are applicable at bar, and the consideration

stressed in those decisions that deposits in advance of sales of goods do not lend themselves to classification as advance "income" to the vendor where, as is true at bar, the cost basis to the vendor for the goods ultimately delivered and sold under the agreement is not computable or determinable at the time of the advance deposit, is fully relevant to, and has cogent force, at bar.

(7) The circumstances discussed under (5) above distinguish also the Schlude and companion Supreme Court cases,^{4/} cited by the Court at page 7 of the Slip Opinion.

Those cases were not sales-of-goods cases in any part; they involved solely advance payments for future services. Moreover, the payments were expressly made irrevocable in those cases and were subject to no even contingent duty requiring return of the payments should the payor elect to request or require refund or should any expressed contingency occur. The amount and extent of services which the payee might have to furnish were subject to the future choice or needs of the payor, but the certainty of the payment as income was never in jeopardy or subject to any expressed contingency. The contract, in short, was final at the time of payment, and the money paid was received absolutely, under a present, total claim of right by the payee.

^{4/} Schlude v. Commissioner (1963) 372 U.S. 128; American Automobile Association v. United States (1961) 367 U.S. 687; and Automobile Club of Michigan v. Commissioner (1957) 353 U.S. 180.

None of these factors exist at bar. Hence the Schlude and companion decisions cannot properly control here.

CONCLUSION

WHEREFORE, upon all of the grounds and for all of the reasons and considerations above stated taxpayer-petitioner, Angelus Funeral Homes, moves the Court for a rehearing herein and a reconsideration of the judgment heretofore rendered.

Respectfully submitted,

LEO BRANTON, JR. and
WILLIAM B. MURRISH

Attorneys for Taxpayer-Petitioner

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

MAY 6 1969

* * * * *

SKI POLE SPECIALISTS, INC., a corporation,
Plaintiff-Appellant,

-vs-

ROBERT J. McDONALD,
Defendant-Appellee.

* * * * *

APPEAL FROM UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

* * * * *

APPELLEE'S RESPONSE TO APPELLANT'S
SUPPLEMENT TO PETITION FOR REHEARING

* * * * *

Lloyd J. Webb
RAYBORN, RAYBORN, WEBB & PIKE

P. O. Box 321
Twin Falls, Idaho 83301

ROBERT J. HENRY
SCHAPP & HATCH

155 Montgomery Street
San Francisco, California 94104

Attorneys for Defendant-Appellee

RECEIVED

MAY 2 1969

WM. B. LUCK, CLERK

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

* * * * *

SKI POLE SPECIALISTS, INC.,)	
a corporation,)	
)	
Plaintiff-Appellant,)	
)	
vs.)	No. 22123
)	
ROBERT J. McDONALD,)	
)	
Defendant-Appellee.)	

APPEAL FROM UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

* * * * *

APPELLEE'S RESPONSE TO APPELLANT'S
SUPPLEMENT TO PETITION FOR REHEARING

* * * * *

Appellee respectfully urges this Court to deny
appellant's Petition for Rehearing upon its Supplement to
its Petition for Rehearing.

This Court issued its opinion on the 4th day of
November, 1968, affirming the Judgment of the United States
District Court for the District of Idaho entered April 1967.
The opinion of this Court, when commented upon the contention
raised by the appellant that the trial court should not have
ruled that the appellant was estopped to urge the invalidity
of patent 3,193,300, did not rest its decision upon the body

of law applicable to estoppel of a licensee or upon the trial court's determination in that regard, but rather rested its determination upon the lack of jurisdiction under the Federal Declaratory Judgment Act, 28 U.S.C., Sections 2201, 2202 (1964). The Court concluded that there had never been a claim of infringement by the appellee against the appellant, and accordingly the Court simply lacked jurisdiction. This position is not affected one whit by any decision of the trial court in the State of Idaho with reference to the validity or invalidity of the license agreement between the appellee, the appellant, and its predecessor in interest. As this Court correctly commented at page five of its opinion F.2d , :

"This is not an action to have the license agreement declared invalid, but to have the patent declared invalid. Under the Federal Declaratory Judgment Act, 28 U.S.C., Sections 2201, 2202 (1964), relief can be granted only in 'a case of actual controversy.' Since, as we have held, plaintiff has not been charged with infringement, no actual controversy exists in this statutory sense with respect to the validity of the patent."

The appellee accordingly respectfully suggests that there is no basis for any rehearing or reconsideration of the Court's decision since none of the recent acts of the trial court for the State of Idaho have in any way affected the jurisdictional issue passed upon by this Court in its

opinion, which issue this Court rested upon in its determination. The fact that the United States District Court for the District of Idaho urged both the lack of jurisdiction and the estoppel by license propositions as bases for its decision, it's scarcely significant in view of the fact that this Court has determined that the trial court lacked jurisdiction for the reasons specified and therefore that its decision dismissing the appellant's action should be affirmed.

As concerns the state trial court's decision entered the 18th day of March, 1969, appropriate motions for reconsideration of this decision have been filed by state court counsel for the appellee, and these motions were set for argument on the 28th day of April, 1969. The arguments were heard on that date, but the disposition of the motions is presently unknown to counsel. In any event, appeal time has not expired from the decision of the trial court. 13-201, Idaho Code. The decision of the trial judge can scarcely be taken as a final decision.

The issue of harmony between the state court and the United States Courts as discussed by the United States District Court for the District of Idaho was no part of the opinion decision of this Court and can scarcely be part of a basis

for rehearing of this Court's decision.

It would appear that the final paragraph of the Appellant's Supplement to Petition for Rehearing is an attempt to argue positions which have been twice rejected, once by the trial court and once by this Court and has nothing to do with any recent developments in the state court or in any other tribunal.

The appellee respectfully requests that the appellant's supplemented Petition for Rehearing be denied.

SCHAPP & HATCH
Residing at 155 Montgomery Street
San Francisco, California 94104

RAYBORN, RAYBORN, WEBB AND PIKE
Residing at P. O. Box 321
Twin Falls, Idaho 83301

Attorneys for Appellee

By John J. [illegible]

CERTIFICATE OF SERVICE

A true copy of the foregoing Appellee's Response to Appellant's Supplement to Petition for Rehearing has been sent to Richard W. Seed of Seed, Berry & Dowrey, 1502 Norton Building, Seattle, Washington, 98104, and James B. Donart of Donart & Donart, 32 East Main Street, Weiser, Idaho, 83672, as attorneys for Appellant, by United States mail, postage prepaid this 1st day of May, 1969.

See Vol.
3463

JUN 24 1969

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

—
No. 22143
—

PENNALUNA AND COMPANY, INC., BENJAMIN A. HARRISON
AND HARRY F. MAGNUSON, *Petitioners*,

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent*.

—
**On Petition To Review an Order of the Securities and
Exchange Commission**
—

PETITION FOR REHEARING
—

Of Counsel:

MAGUIRE AND TUCKER
2000 L Street, N. W.
Washington, D. C.

LAWRENCE R. SMALL,
Attorney for Petitioner
Harrison

PAINE, LOWE, COFFIN,
HERMAN AND O'KELLY
602 Spokane and Eastern Bldg.
Spokane, Washington

WILLIAM J. KENNEY,
Attorney for Petitioner
Magnuson



IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22143

PENNALUNA AND COMPANY, INC., BENJAMIN A. HARRISON
AND HARRY F. MAGNUSON, *Petitioners*,

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent*.

**On Petition To Review an Order of the Securities and
Exchange Commission**

PETITION FOR REHEARING

Pennaluna and Company, Inc. (Pennaluna), Benjamin A. Harrison (Harrison) and Harry F. Magnuson (Magnuson), Petitioners herein, respectfully petition for rehearing (with reargument), reconsideration and affirmance, in part, and reversal, in part, of the Court's decision of April 10, 1969. We are appreciative of the care and attention which this Court has given to Petitioners' cause, as witnessed by the well prepared and active participation of

the Court at Oral Argument, the time which the Court retained the case for deliberation, as well as the opinion itself. We nevertheless earnestly submit that the sound administration of the Securities Act, as well as simple justice dictate the grant of this petition for rehearing.

Without waiving our other contentions, this petition is addressed mainly to the issues of the Burden of Proof, the question of Magnuson's control of Silver Buckle and the question of the propriety of the penalties imposed. We respectfully submit that the court has erred in its holding that Commission was correct in imposing upon Petitioners the burden of establishing a lack of Control by Magnuson and in holding that Magnuson in fact was in Control of Silver Buckle.

The Court recognizes that: "While the Congressional Concern reached to all secondary distributions of significant proportions it was obvious that it could not impose upon a seller other than the issuing corporation the duty of registering his stock unless the shareholder was in a position to require the issuing Corporation to seek registration" (slip 5).

The standard established is clear: "Is a particular person in a position to obtain the required signatures of the issuer and its officers and directors on a registration statement?" (slip 5).

We earnestly submit that the Court errs in imposing on the seller in a secondary offering the burden of establishing his inability to secure the necessary corporate action.

How is such burden to be sustained? Indeed how does one prove a negative? In the instant proceeding the Commission and, apparently, this Court have ignored the uncontroverted testimony of Dr. Scott, Silver Buckle's President and the individual who was exercising managerial control over the corporation, that control of the Corporation rested in Scott, Gay, Hull and Crammer. The Court

itself recognizes that these individuals were "unquestionably in control of Silver Buckle."

The Court relies on *SEC v. Franklin Atlas Corp.*, 154 F. Supp. 395 (SDNY, 1957), but the result in that proceeding on the actionable facts there involved dictates a reversal of the Commission's ruling in the instant proceeding. As to *SEC v. Culpepper*, 270 F. 2d 241 (2nd Cir., 1959) we can only suggest that the factual pattern there is the direct opposite of the instant case. There the defendant, Culpepper, had been in unquestioned control of the corporation, and had only recently resigned as its President, continued as a consultant and was one of its largest stockholders at the time of the sales in question.

It is apparent that the Court's language in both cases was merely judicial shorthand descriptive of the patently evident action of the defendants in devising a fraudulent scheme to evade the Statute. In each case, the Court first found clear Prima Facie cases of the exercise of statutory Control, as well as Prima Facie cases of statutory violations. The so-called Burden of Proof argument in each case in reality merely noted the absence of any real defense to the facts establishing the exercise of Control. Further, the remedy which the Commission sought to achieve was merely to enjoin future violations—not to debar the individuals permanently from their means of livelihood.

We have no dispute with the proposition that in a primary distribution where the shares come from the issuing company, there is a presumptive need for registration. It is a sound, practical requirement that in such circumstances, one who claims an exemption from the registration requirements of section 5 has the burden of proving the exemption applies. *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953); *SEC v. Sunbeam Gold Mines Co.*, 95 F. 2d 699 (9th Cir., 1938). We submit that to apply the presumptive test to secondary distributions, without resort to the

rule making processes of the Commission with its attendant notice, hearing and future application concepts, is a violation of Petitioners' rights to administrative due process.

The results of the instant case are illustrative, and the *Culpepper* and *Franklin Atlas* cases relied on by the court stand in sharp contrast.

Here, the Commission imposed a burden—you are presumed to be in control of Silver Buckle until you prove otherwise. From that presumption flowed its finding of control, its conclusion of violations of the Act, which, in turn, supported the finding of fraud which justified its permanent debarment of the individuals.

The Court should note that the *Culpepper* and *Franklin Atlas* cases banned future conduct with respect to the stock in question. Here, the Commission on the strength of such presumptions, seeks permanently to debar the Petitioners from the right to earn a livelihood. This presumption of illegal conduct is without parallel in the law and should not itself be presumed in the absence of clear Congressional intent. Indeed, while the concept of the burden of proof is an oft-quoted concept, every case examined by counsel herein shows clearly that in each such case the court found clear evidence of specific acts of the exercise of control by the individuals concerned, or specifically found the individuals concerned to have acted as agents for those in control. There is no such finding in the instant case. But, even if the burden lies with Petitioners, Petitioner Magnuson clearly has met that burden.

MAGNUSON'S CONTROL OF SILVER BUCKLE

This Court has rightfully held that the intent of Congress was not to impose a duty of registration upon persons who were not in a position "to *require* the issuing Corporation to seek registration" (slip P 5, *italic added*) and that to require registration by a particular person, he

“must be in a position to obtain the required signatures of the issuer and its officers and directors on a registration statement.” (slip P 5). We concede that “Control is not determined by artificial tests—but from the particular circumstances of the case; that, arguendo, it is not necessary for one to be an officer, director or manager or even a shareholder to be a controlling person; and, that control may exist although not continuously and actively exercised. (slip P 6)

It is recognized that the question of what constitutes “Control” is one for initial determination by the Commission and that the Commission’s findings should not be overruled so long as there is warrant in the record for the judgment of the expert body.¹ We do not dispute that Magnuson ultimately came into control of the Company. The Question which was before the Commission and is now before the Court is—When. The Commission resolves the question by finding he was in control from his first contact with the Company in May, 1962. We submit that holding contravenes all prior precedent of the Commission and the Courts and is wholly without evidentiary support in the record. Indeed it is directly contrary to record evidence. Since the Commission has not otherwise established the date of control, we submit this Court must reverse its finding that Magnuson was “in control” of the Corporation at the time of the Purchase and Sales Complained of.

We recognize that the question of Who is in Control of a Corporation is a question of fact for determination by the Jury or the Commission as the case may be.² Indeed Commission Policy will not permit its lawyers to express opinions as to the existence or nonexistence of control

¹ Rochester Tel. Corp. v. U.S., 307 U.S. 125, 146, 83 L. Ed. 1147, 1161, 59 S. Ct. 754.

² See Stadia Oil and Uranium Co. v. Wheelis, 251 F. 2d 269; Wilko v. Swan, 127 F. Supp. 55; Archer v. SEC, 133 F. 2d 795, 799.

rule making processes of the Commission with its attendant notice, hearing and future application concepts, is a violation of Petitioners' rights to administrative due process.

The results of the instant case are illustrative, and the *Culpepper* and *Franklin Atlas* cases relied on by the court stand in sharp contrast.

Here, the Commission imposed a burden—you are presumed to be in control of Silver Buckle until you prove otherwise. From that presumption flowed its finding of control, its conclusion of violations of the Act, which, in turn, supported the finding of fraud which justified its permanent debarment of the individuals.

The Court should note that the *Culpepper* and *Franklin Atlas* cases banned future conduct with respect to the stock in question. Here, the Commission on the strength of such presumptions, seeks permanently to debar the Petitioners from the right to earn a livelihood. This presumption of illegal conduct is without parallel in the law and should not itself be presumed in the absence of clear Congressional intent. Indeed, while the concept of the burden of proof is an oft-quoted concept, every case examined by counsel herein shows clearly that in each such case the court found clear evidence of specific acts of the exercise of control by the individuals concerned, or specifically found the individuals concerned to have acted as agents for those in control. There is no such finding in the instant case. But, even if the burden lies with Petitioners, Petitioner Magnuson clearly has met that burden.

MAGNUSON'S CONTROL OF SILVER BUCKLE

This Court has rightfully held that the intent of Congress was not to impose a duty of registration upon persons who were not in a position "to *require* the issuing Corporation to seek registration" (slip P 5, *italic added*) and that to require registration by a particular person, he

“must be in a position to obtain the required signatures of the issuer and its officers and directors on a registration statement.” (slip P 5). We concede that “Control is not determined by artificial tests—but from the particular circumstances of the case; that, arguendo, it is not necessary for one to be an officer, director or manager or even a shareholder to be a controlling person; and, that control may exist although not continuously and actively exercised. (slip P 6)

It is recognized that the question of what constitutes “Control” is one for initial determination by the Commission and that the Commission’s findings should not be overruled so long as there is warrant in the record for the judgment of the expert body.¹ We do not dispute that Magnuson ultimately came into control of the Company. The Question which was before the Commission and is now before the Court is—When. The Commission resolves the question by finding he was in control from his first contact with the Company in May, 1962. We submit that holding contravenes all prior precedent of the Commission and the Courts and is wholly without evidentiary support in the record. Indeed it is directly contrary to record evidence. Since the Commission has not otherwise established the date of control, we submit this Court must reverse its finding that Magnuson was “in control” of the Corporation at the time of the Purchase and Sales Complained of.

We recognize that the question of Who is in Control of a Corporation is a question of fact for determination by the Jury or the Commission as the case may be.² Indeed Commission Policy will not permit its lawyers to express opinions as to the existence or nonexistence of control

¹ Rochester Tel. Corp. v. U.S., 307 U.S. 125, 146, 83 L. Ed. 1147, 1161, 59 S. Ct. 754.

² See Stadia Oil and Uranium Co. v. Wheelis, 251 F. 2d 269; Wilko v. Swan, 127 F. Supp. 55; Archer v. SEC, 133 F. 2d 795, 799.

except in the clearest cases.³ But, the history of our jurisprudence demands some evidence to support the finding of the fact finding body.

What standards support the finding of a Control relationship? This court has accepted the concept of the ability of the individual to obtain the requisite signatures on the Registration Form. How is this demonstrated? We have researched the Commission's opinions, orders and material. We find no provision whereby an individual can force a company to effect registration. Indeed in an unrelated matter we have been advised that an individual could not intervene to force registration of his stock when the Company seeks to register a special block of stock. And in the absence of contractual obligation, we find no judicial precedent for requiring a Corporation to effect registration of its stock.

We have researched contemporaneous statutes using the concept of Control. In the *Allegheny Corp. v. Breswick & Co.*, interpreting the use of the word "control" in section 5 of the Interstate Commerce Act⁴ the Court there held:

"The crux of each inquiry to determine whether there has been an 'acquisition of control is the nature of the change in relations between the Companies whose proposed transaction is before the Commission for approval. Does the transaction accomplish a significant increase in the power of one over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease'?"⁵

³ Gadsby, Business Organization, Vol. IIA. See 3.02(2), citing Loss, Security Regulation, Vol. II, p. 782. Edmund Gadsby is Former Chairman of SEC.

⁴ 54 Stat. 899, 905, 49 USC § 5(2)(Q).

⁵ *Allegheny Corp. v. Breswick and Co.*, 353 U.S. 151, 169, 1 L. Ed. 2d 726, 739, 77 S. Ct. 763.

There is no evidence that Magnuson realized any such change vis-a-vis Silver Buckle during the period of May 1962, or through January 1963.

In *Detroit Edison Co. v. Securities and Exchange Commission*, the Sixth Circuit, interpreting the concept of Control as used in the Public Utility Holding Company Act,⁶ after reviewing the extensive evidence of interlocking relationships, held:

“The types of control referred to are: (1) through complete ownership of capital stock, (2) a majority ownership, (3) through a legal device without majority ownership such as pyramiding through holding companies or a large issue of non-voting stock with a comparatively small issue of stock with voting rights, or voting trust, (4) Minority control, which exists when comparatively few shares of Corporate stock are in the hands of one group and the remainder widely scattered, (5) Managerial Control, which exists where all the stock is so widely distributed that no stockholder takes sufficient interest in the affairs of the Corporation to influence or control it, (6) Proxy Control through Committees, (7) through interlocking Corporate Officers or directors.”⁷

There is no evidence that Magnuson could assert any such powers over Silver Buckle during the period from May 1962, through January 1963.

The most relaxed concept of “Control” our research has established is applied in determining whether an account is subject to the control of a brokerage firm for purposes of determining a finding of “Churning”. Even there, it is held that the evidence must establish that the customer *invariably* relied on the dealers’ recommendations.⁸ There

⁶ The Public Utility Holding Company Act of 1935, 49 Stat. 834, 15 USCA, § 79x.

⁷ *Detroit Edison Co. v. Securities and Exchange Commission*, 119 F. 2d 730, 739.

⁸ *Hecht v. Harris, Upham and Co.*, 283 F. Supp. 417, 433.

is no evidence that, during the period of May 1962 through January 1963, Silver Buckle invariably relied upon—or even sought—Magnuson's advice on anything. All they sought—or received—was assistance in locating someone to buy the shares in question.

Unfortunately the cases wherein no control is found are not generally reported. A few such cases are available. In *Wilko v. Swan*, the Corporate Counsel who was also a member of its Board of Directors was found not to be "in Control of" Air Associates, the Company in question.⁹ In *U. S. v. Sherwood*, an individual dominating 8% of the stock, not a member of the Board of Directors, was found not to be a control person.¹⁰

Finally, in *Winter v. D.J.&M. Investment and Construction Co.*, the Court held:

"Ross had no connection with the issuer and the only evidence which might possibly indicate a control relationship existing between Usedco and D.J.&M. is that Cravitz, the defendant, was an attorney for both Corporations.

"The evidence is quite clear that the sale * * * was made by Ross as principal and not as an agent for D.J.&M. * * *

"Each step in these transactions regressing from the sale to the plaintiff makes the possibility of finding of control more remote. The Control must be a Control by the defendant involved of the defendant found liable, i.e. Ross. As to Rothbord and Tells, it does not appear that they were at all acquainted with Ross. D.J.&M. was but one of the sources from which Ross obtained the Usedco stock he was selling to the public. There is no evidence upon which to base a finding that D.J.&M. controlled Ross.

⁹ *Wilko v. Swan*, *supra*, footnote 2, see also 346 U.S. 427, 429, 98 L. ed. 168, 172, 74 S. Ct. 182.

¹⁰ *U.S. v. Sherwood*, 175 F. Supp. 480, 483. The Court will note that Chief Judge Sugarman there held that there is no authority for holding that shares once owned by "Control" persons retain "control" characteristics in the hands of subsequent owners.

“There are suspicious circumstances from which one gains the impression that there have been shady goings-on, but the defendants cannot be held liable on suspicion.”¹¹

We submit, however that the Commission wholly failed to find or establish a single indicia of the exercise of Control of Silver Buckle by Magnuson during the relevant period—other than the purchase and sales complained of. There is no indication he held any office, made any decisions, managerial, investment, or even janitorial relevant to the corporation. He guaranteed no loans, advanced no money, did not act as a consultant, or in any other way act for the corporation, direct the acts of others on behalf of the corporation, or hold himself out as having any authority to act for the corporation or to cause or influence its decisions. Further, there is no evidence that during the relevant period, Magnuson benefited directly or indirectly from the acts of the corporation. Finally, there is no showing that his service on subsidiaries in any way influenced the activities of Silver Buckle, or was motivated by anything other than his personal investment in these subsidiaries.

We submit that if the purchase and sale of stock be an indicia of Control the opinion herein will create control situations affecting countless investment bankers, broker-dealers and others. The detrimental effect of such a holding on the financial community at large should not be ignored.

We further submit that the Commission and the Court have ignored the relevant facts of record. Indeed the Court finds that Scott, Gay, Hull and Crammer were included in “those unquestionably in Control of Silver Buckle”. The Court should note that the only evidence in

¹¹ Winter v. D. J. & M. Investment & Construction Corp., 185 F. Supp. 943.

the record bearing on the question of control are the depositions of Scott, Magnuson, Gay and Hull. Magnuson denies being in control, and Scott, Gay and Hull identify themselves as the controlling persons. Dr. Scott's testimony on the subject is unrefuted and uncontested. And Dr. Scott did *not* include Magnuson as a person in Control (Tr. 2050-2051). What the Commission ignored in reviewing Magnuson's so-called "prior relationship with those individuals who clearly constituted the Silver Buckle Control Group," was that Wallace, Idaho, is a community of some 3000 persons. Magnuson is a leading Certified Public Accountant there; Hull, one of its leading attorneys; and, Pennaluna, one of its few broker-dealers.

For those "who clearly constituted the Silver Buckle Control Group" to turn to them and Pennaluna for assistance is wholly understandable, and surely not sinister. It hardly constitutes evidence of any quality that Magnuson was thereby placed in a "position to *require* the issuing Corporation to seek registration" or "to *obtain* the required signatures of the issuer and its officers and directors on a registration statement". By what color of Authority or Persuasion was Magnuson "to require" or "to obtain" the requisite signatures? We most earnestly suggest to this Court that the Commission has built its case on shadow, innuendo, presumption and hindsight. Surely this is not the quality of evidence upon which an individual can be permanently deprived of the right to pursue his profession.

We are not here talking of an action to enjoin future conduct—in such instance the exigencies of protecting the public interest may well dictate restraining the individual rights and preserving the status quo. Here the Commission seeks, permanently, to debar the individuals from their profession by virtue of past conduct—without ever proving the essential requisite to establish such conduct as violative of the Statute. We submit that application of the presumption of control in these circumstances deprives the Peti-

tioner of his Constitutional rights to administrative due process.

We shall not burden the record by mere restatement of arguments previously made. We here incorporate by reference, Petitioner Magnuson's Reply Brief on the Petition for review, and adopt same for all Petitioners on Rehearing.

We submit that the Violations by both Magnuson and Harrison, as well as the Antifraud Violations and the Bids and Purchases of Stock during distribution are not supported by substantial facts of record. With respect to Attorney Hull's letter of Oct. 5, 1962, we respectfully invite the Court's attention to the fact that the "relevant facts" not discussed in the letter were fully known to the Attorney—as witness his close relationship to both Magnuson and the Control Group. We must then presume that they were given due professional weight in reaching his decision that Magnuson was not in Control.

As to the conduct of the SEC staff, we pray the court to recognize that these were by no means an afterthought. They may well represent the truly shocked reaction of new counsel on hearing of the staff's conduct and whose entry into the case came after expiration of the rehearing time before the Commission. We respectfully urge the court to find that such conduct which is unbecoming a government agency is per se prejudicial. As to the specificity, we have prayed for a hearing on the subject to bring to the Commission's attention the specific instances complained of. This we were denied, but we still feel the Commission is the proper forum in which to air such complaints. We urge the court to direct the Commission to entertain that petition.

CONCLUSION

For the foregoing reasons, we respectfully submit that a rehearing, en banc with reargument should be ordered in this case.

Respectfully submitted,

Of Counsel:

MAGUIRE AND TUCKER
2000 L Street, N. W.
Washington, D. C.

WILLIAM J. KENNEY,
*Attorney for Petitioner
Magnuson*

PAINE, LOWE, COFFIN,
HERMAN AND O'KELLY
602 Spokane and Eastern Bldg.
Spokane, Washington

LAWRENCE R. SMALL,
*Attorney for Petitioner
Harrison*

June, 1969

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

|||

MAY 22 1969

RICHARD SIMPSON,

Petitioner,

vs.

AMERICAN OIL COMPANY OF CALIFORNIA,
Corporation,

Respondent.

No. 22148 ✓

See Vol. 3464

MAY 22 1969

PETITION OF RICHARD SIMPSON
FOR REHEARING AND SUGGESTION
OF THE APPROPRIATENESS OF A
REHEARING IN BANC

MAXWELL KEITH
111 Pine Street #914
San Francisco, California
981-1361

JAMES J. DURYEA
1600 Mills Tower
San Francisco, California
DO 2-7422

Attorneys for petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

|||

RICHARD SIMPSON,

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AMERICAN OIL COMPANY OF CALIFORNIA,
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Respondent.

PETITION OF RICHARD SIMPSON
FOR REHEARING AND SUGGESTION
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MAXWELL KEITH
111 Pine Street #914
San Francisco, California
981-1361

JAMES J. DURYEA
1600 Mills Tower
San Francisco, California
DO 2-7422

Attorneys for petitioner

THE DECISION OF THE COURT DISALLOWING PETITIONER FROM OBTAINING THE BENEFIT OF HIS APPELLATE AND JURAL VICTORY IS CONTRADICTORY TO THE RULINGS OF THE SUPREME COURT THAT SUCCESSFUL APPELLANT MUST RECEIVE THE BENEFITS OF THE RULING OF THE APPELLATE COURT	1
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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

|||

RD SIMPSON,

Petitioner,

vs.

OIL COMPANY OF CALIFORNIA,

Respondent.

No. 22148

PETITION OF RICHARD
SIMPSON FOR REHEARING AND
SUGGESTION OF THE APPRO-
PRIATENESS OF A REHEARING
IN BANC

to the Honorable United States Court of Appeals for the Ninth
t:

petitioner prays that this court grant a rehearing of its
nt filed April 30, 1969, affirming the judgment of the trial
below and suggests the appropriateness of this rehearing in
or the following reasons:

- I. THE DECISION OF THE COURT DISALLOWING
PETITIONER FROM OBTAINING THE BENEFIT
OF HIS APPELLATE AND JURAL VICTORY IS
CONTRADICTORY TO THE RULINGS OF THE SUPREME
COURT THAT SUCCESSFUL APPELLANT MUST RE-
CEIVE THE BENEFITS OF THE RULING OF THE
APPELLATE COURT.

Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481
the Supreme Court stated as follows in a private treble
action brought under the antitrust laws, at p. 496:

"The theory of the Court of Appeals
seems to have been that when a party has

significantly relied upon a clear and established doctrine, and the retrospective application of a newly declared doctrine would upset that justifiable reliance to his substantial injury, considerations of justice and fairness require that the new rule apply prospectively only. Pointing to recent decisions of this Court in the area of the criminal law, the Court of Appeals could see no reason why the considerations which had favored only prospective application in those cases should not be applied as well as in the civil area, especially in a treble damage action. There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. Because we do not believe that this case presents such a situation, we have no occasion to pass upon the theory of the Court of Appeals."

In the area of criminal law the Supreme Court has ruled the appellant in a criminal case is entitled to the benefit of any new rule established as a result of his appeal. This is the ruling in Stovall v. Denno, 388 U.S. 293 (1967). At 388 U.S. 301, the Supreme Court stated after holding that petitioners Wade and Gilbert in related cases were entitled to the vacation of their convictions because the state had violated the Fifth and Sixth Amendments as interpreted in their appeals in admitting evidence tainted illegal lineup evidence:

"We recognize that Wade and Gilbert are, therefore, the only victims of pre-trial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions."

This decision was reaffirmed in Desist v. United States, 394 U.S. ___, (1969), 89 S.Ct. 1030, at 1036, fn. 24.

Clearly, if, in the criminal law field, where the Supreme Court indicated no other limitations on the ability to make its decisions prospective, this decision is controlling in civil litigation based on federal statutes which still involves serious questions as to the applicability of purely prospective decisions.

It is respectfully urged that Stovall and Desist answer the underlying question in Hanover; that the courts will never deny a successful litigant the benefits of his decision in any area of where public policy demands that appeals be encouraged.

II. THE DECISION OF THE COURT WITH REGARD
TO THE ORDER GRANTING A NEW TRIAL GIVES
THE DEFENDANT THE BENEFITS OF AN ILLEGAL
SCHEME IN VIOLATION OF THE ANTITRUST
LAWS CONTRARY TO THE SUPREME COURT
DECISIONS.

Petitioner respectfully urges that the learned Court's analysis of the damage rule to be applied to service station lease meter cases is erroneous because (1) it allows the defendant the benefit of his own wrong, (2) it fails to recognize the economic value of the business, personal to a dealer who has extended himself to create it, consisting of customer loyalty and goodwill (3) is inconsistent with damage law which insures the obtaining of all lost values from a wrong done.

This court has adopted the criteria of Standard Oil Company California v. Moore, 251 F.2d 188 (9th Cir. 1958) to this question. But the Simpson case involves a lease operation whereas re involved a service station marketer who owned the land and

other capital assets of the business. The scheme presented this court showed that Union Oil Co. issued short-term leases in order to control price judgments. It elected not to operate relations with employees entitled to the benefits of social legislation enacted by the United States and state legislatures for employees, including, among others, the unquestioned right to bargain collectively to redress industry grievances. It instead relied on individual incentive of the lessee dealer based upon the profits he would earn under the leased operation. Respondent is not entitled now to assert that the lessee is not making profits as shown in his books and records and his income tax returns, and that the dealer's profits are to be measured as a matter of law only after considering a fair compensation to him.

The factual presentation of the petitioner shows the oppression of dealer-lessees and the destruction of petitioner's entire business. The short-term lease was the hub of this oppressive scheme. It is respectfully urged that the Honorable Court should allow damage instructions limited to exchange value under the circumstances of transferring short-term leases. This case, thus, is in that area of law where the defendant by his own wrong has prevented a strict damage formulation from being utilized, and, therefore, allows the jury to base its verdict upon all the relevant data and render its verdict accordingly. Bigelow v. RKO
Picture Pictures, 327 U.S. 251 (1946). ^{/1 *}

The damage formula adopted by the Court is based on exchange value alone. But this is not the only value destroyed by Union

See Footnote page.

Co. The customer loyalty and goodwill developed by Simpson
faith of future profits was an economic asset and is compensa-
e. Under Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946) it
measurable by loss of profits to Simpson. See Lessig v.
ewater Oil Co., 327 F.2d 459 (9th Cir. 1964).

Bigelow allows an award of damages for the loss of all values
private antitrust actions. In this it is no different or
cial than damage law covering the commission of intentional
ts. The Restatement, Torts, specifically allows the recovery
the loss of all values when there is an intentional destruction
a legally protected interest. Restatement, Torts, §927 (1939).

Value is specifically defined by the Restatement as either
change value" or "value to the owner where this is greater than
exchange value." Id, at §911.

Restatement, Torts, §911, p. 568 states:

"Real property may also have a value
to the owner greater than its exchange
value. Thus a particular location may be
valuable to an occupant because of a bus-
iness reason, as where he has built up
good will in a particular neighborhood."

It is respectfully urged that the circumstances of this case
not admit a strict Rule of damages limiting value to exchange
ue.

III. THIS PETITION SHOULD BE HEARD IN BANC

This probably is the first time in the history of federal
islation in which an existing remedy for a litigated wrong has
a denied to a successful litigant. In footnote 6 of the

rt's opinion there is set forth those cases which prevent a
e-time litigant from obtaining the benefits of his victory. In
ch of these cases the plaintiff did not have a remedy for a
ong until the decision of the overruling court or the court
and no wrong doing but issued a caveat warning. The issue
olved removal of a known bar to a remedy. In this case,
mpson had an existing federal remedy for the wrong done and
e issue was proof of the wrong. The essence of the constitution-
framework is that the courts support congressionally enacted
islation allowing a remedy for a wrong done and injury caused.
e Louis Pizitz Dry Sands Co. v. Yeldell, 274 U.S. 112 (1927);
Northern Securities Co. v. United States, 193 U.S. 197 (1903).
s basic principle, it is urged, is raised in this petition.

It is respectfully urged that the decision of the honorable
rt does take away an existing remedy under the antitrust laws
l that this petition is therefore well within the provisions of
ederal Rules of Appellate Procedure, Rule 35, allowing a rehear-
g in banc when the proceeding involves a question of exceptional
ortance.

Dated: May 13, 1969

Respectfully submitted,

MAXWELL KEITH
JAMES DURYEA

By: _____

MAXWELL KEITH

ACKNOWLEDGEMENT OF SERVICE

I hereby acknowledge receipt of the foregoing this _____
of May, 1969.

Brobeck, Phleger & Harrison
Attorneys for Respondent.

Bigelow v. RKO Radio Pictures, at 327 U.S. 264-266:

"Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. See *Package Closure Corp. v. Sealright Co.*, 2 Cir., 141 F.2d 972, 979. That principle is an ancient one, *Amory v. Delamirie*, 1 Strange 505, and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application. In cases of collision where the offending vessel has violated regulations prescribed by statute, see *The Pennsylvania*, 19 Wall. 125, 136, 22 L.Ed. 148, and in cases of

confusion of goods, Great Southern Gas & Oil Co. v. Logan Natural Gas & Fuel Co., 6 Cir., 155 F.114, 115; cf. F.W. Woolworth Co. v. N.L.R.B., 2 Cir., 121 F.2d 658, 663, the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable. And in cases where a wrongdoer has incorporated the subject of a plaintiff's patent or trade-mark in a single product to which the defendant has contributed other elements of value or utility, and has derived profits from the sale of the product, this Court has sustained recovery of the full amount of defendant's profits where his own wrongful action has made it impossible for the plaintiff to show in what proportions he and the defendant have contributed to the profits. Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co., 225 U.S. 604, 32 S.Ct. 691, 56 L.Ed. 1222, 41 L.R.A., N.S. 653; Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 36 S.Ct. 269, 60 L.Ed. 629; see also Sheldon v. Metro-Goldwyn

Pictures Corp., 309 U.S. 390, 406, 60 S.Ct. 681, 687, 84 L.Ed. 825.

'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights. Story Parchment Co. v. Paterson Parchment Paper Co., supra, 282 U.S. 565, 51 S.Ct. 251, 75 L.Ed. 544; and see also Palmer v. Connecticut Railway Co., 311 U.S. 544, 559, 61 S.Ct. 379, 384, 85 L.Ed. 336 and cases cited."

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELEN REYES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

MICHAEL J. LIGHTFOOT
Assistant U. S. Attorney

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012
688-2434 - 688-2423

Attorneys for Appellee
United States of America

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELEN REYES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF PROCEEDINGS

On November 10, 1966, the Federal Grand Jury for the Southern District of California, Central Division, returned an indictment in four counts charging the defendant HELEN REYES and one David J. Gonzalez with the sale and concealment of heroin on July 28, 1966, and August 29, 1966 [Case No. 36813 - C. T. 2-5].^{1/} On November 10, 1966, the Federal Grand Jury for the Central District of California returned a two-count indictment against the defendant and Gonzalez charging the sale and concealment of heroin on October 13, 1966 [Case No. 57 - C. T. 2-3]. Both defendants

^{1/} C. T. refers to Clerk's Transcript.

plead not guilty to all counts, and Cases 36813 and 57 were consolidated [Case No. 36813 - C. T. 6; Case No. 57 - C. T. 4].

Defendant Helen Reyes was separately tried by a jury before the Honorable Jesse W. Curtis on April 25 and 26, 1966. On the latter date, verdicts of not guilty were returned on the two counts involving the July 28, 1966 transaction [Case No. 36813 - C. T. 32]. Verdicts of guilty were returned on the two counts involving the August 29, 1966 transaction [Case No. 36813 - C. T. 32, 33], and the October 13, 1966, transaction [Case No. 57 - C. T. 14-15].

The defendant's motion for a new trial was denied on June 19, 1967, and the defendant was sentenced to five years imprisonment on each of the four counts, the sentences to run concurrently [Case No. 36813 - CT 35; Case No. 57 - C. T. 17].

Notice of appeal was filed on June 19, 1967 [Case No. 36813 - C. T. 38-39; Case No. 57 - C. T. 19-20].

II

STATUTE INVOLVED

Section 174, Title 21, United States Code, provides in pertinent part as follows:

"Whoever . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States

contrary to law, . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. "

III

STATEMENT OF FACTS

A. TRANSACTION OF AUGUST 28, 1966.

Agent Sergio Borquez of the Bureau of Narcotics met with an informant, Manuel Martinez, the night of August 28, 1966, relative to a possible narcotics transaction [R. T. 122-23]. ^{2/} Under the observation of Borquez, Martinez met with co-defendant David Gonzalez at the corner of Crockett and 83rd Streets, Los Angeles [R. T. 123]. Shortly thereafter a 1961 Chevrolet driven by a woman - License No. KIJ 959 - drove up [R. T. 124]. The car belonged to

^{2/} R. T. refers to Reporter's Transcript.

the defendant [R. T. 186]. Martinez then returned to Borquez who gave the informant \$120 [R. T. 124]. Martinez gave the money to Gonzalez who in turn handed two rubber condoms to the informant [R. T. 125]. These condoms, it was later determined, contained heroin [R. T. 115].

The jury returned verdicts of not guilty as to the two counts relative to this transaction.

B. TRANSACTION OF AUGUST 29, 1966.

Agent Borquez of the Bureau of Narcotics met with the same informant on August 29, 1966, relative to another possible narcotics transaction [R. T. 127]. He listened in to a telephone conversation between the informant and co-defendant Gonzalez when Gonzalez advised that he would have to be taken to meet with "the woman" [R. T. 128]. Borquez, Gonzalez, and the informant then drove to Ferris Street and Whittier Boulevard [R. T. 129]. Gonzalez got out of the car, made a phone call, returned to the car and asked for money, stating "the woman" was on her way [R. T. 129]. After waiting at the corner of Whittier and Ferris Streets, Los Angeles, for about twenty-five minutes, the defendant drove up in a 1961 Chevrolet - license No. KIJ 959 - and parked [R. T. 124, 130]. The car was registered to the defendant [R. T. 186]. Gonzalez went up to the car and leaned in the window [R. T. 130, 165]. A surveilling agent, Herbert Emrod, saw the defendant hand Gonzalez a small object at this point [R. T. 165].

The defendant left her car and she and Gonzalez entered a drugstore at the corner [R. T. 131, 166]. Surveilling agent Emrod followed the two into the drugstore where he observed Gonzalez hand an object to the defendant [R. T. 166]. Gonzalez then departed the drugstore and proceeded back to the car of Agent Borquez, where he handed Borquez a rubber condom [R. T. 132]. The contents of the condom were analyzed to contain heroin [R. T. 117].

C. TRANSACTION OF OCTOBER 13, 1966.

On October 13, 1966, Agent Borquez again met with David Gonzales and the informant and the three proceeded to Hubbard and McDonnell Streets in East Los Angeles. Gonzalez again asked for money, stating he was going to "the connection's" house [R. T. 134]. Agent Borquez gave Gonzalez \$240 in prerecorded bills and Gonzalez then left on foot west on Hubbard Street and then north on McBride Street out of sight of Agent Borquez [R. T. 134]. The three previously mentioned individuals had been under the constant surveillance of Agent Caromb Durel from the time that Borquez and the informant met and proceeded to pick up Gonzales on the afternoon of October 13 [R. T. 177]. After Gonzalez left Borquez's car, Durel observed him proceed north on McBride Street and disappear behind the residence at 662 McBride Street [R. T. 177-178]. Durel observed Gonzalez reappear some twenty minutes later and run back to Agent Borquez's car [R. T. 178]. Durel then joined Borquez where Gonzalez was placed under arrest

and Durel was advised by Borquez that a narcotics transaction had taken place [R. T. 179]. Borquez then observed Gonzalez give Agent Ortiz a plastic bag [R. T. 135]. The contents of the bag were determined to contain heroin [R. T. 120].

Agent Durel then proceeded to the rear of 662 McBride and knocked on the door of 662-1/2 McBride. A man answered and replied to Durel's question that the defendant was in the bedroom. Durel then entered the house and placed the defendant under arrest [R. T. 179]. The defendant subsequently surrendered to Agent Durel \$220 from her brassiere which Durel determined to match the serial numbers of the bills previously given to Gonzalez [R. T. 183].

D. MOTION FOR SUPPRESSION OF EVIDENCE.

Agent Caromb Durel of the Federal Bureau of Narcotics, who arrested the defendant on October 13, 1966, testified before trial at a hearing to determine probable cause for arrest as follows:

He had been advised by fellow Narcotics Agents that David Gonzalez engaged in a heroin transaction on July 28, 1966, and that a 1961 Chevrolet - license No. RIJ 959 - had also been involved [R. T. 67-68; 73-74]. He had further been advised that the car in question belonged to the defendant [R. T. 68]. Fellow agents further apprised Durel that Gonzalez engaged in a hand-to-hand heroin transaction with a woman on August 29, 1966, and that the same 1961 Chevrolet had been used [R. T. 68; 71-72; 75]. Narcotics

Agent Herbert Emrod had shown Durel a photograph of the defendant and identified her as the woman who participated in the August 29 transaction [R. T. 71].

On October 13, 1966, Durel observed Gonzalez leave a vehicle containing an Agent and an informant and then disappear behind the residence at 662 McBride Street [R. T. 69]. Durel observed the 1961 Chevrolet involved in the previous transactions parked in the driveway at that address [R. T. 69].

Gonzalez reappeared in about twenty minutes and was arrested by Agent Sergio Borquez [R. T. 69]. After he approached Borquez's vehicle, Durel was informed that recorded money previously given to Gonzalez was gone and that what appeared to be narcotics had been taken from him [R. T. 69-70]. Durel then went to the rear of 662 McBride and knocked on the door of the residence at 662-1/2 McBride [R. T. 70, 84]. He asked a man who opened the door if Helen Reyes was there. The man replied that she was [R. T. 70]. Durel thereupon entered the house and placed the defendant under arrest [R. T. 70]. Upon Durel's request, the defendant removed some bills from her brassiere and handed them to him. Durel compared these bills with a previously recorded list of serial numbers and they matched [R. T. 72].

QUESTIONS PRESENTED

- A. WHETHER THE FAILURE TO RECORD THE GRAND JURY TESTIMONY VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHTS.
- B. WHETHER THE INDICTMENT WAS INVALID ON THE BASIS OF SPECULATION THAT INADEQUATE EVIDENCE WAS PRESENTED TO THE GRAND JURY.
- C. WHETHER THE ARREST AND SUBSEQUENT SEARCH OF THE DEFENDANT WERE PROPER.
- D. WHETHER THE ADMISSION OF HEARSAY TESTIMONY ADMISSIBLE UNDER THE RULES OF EVIDENCE DENIED THE DEFENDANT A FAIR TRIAL.
- E. WHETHER THE PRESUMPTION OF KNOWLEDGE OF ILLEGAL IMPORTATION CONTAINED IN 21 U.S.C. , §174 IS CONSTITUTIONAL.
- F. WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT A VERDICT OF GUILTY.

ARGUMENT

A. FAILURE TO RECORD THE GRAND JURY
TESTIMONY DID NOT VIOLATE THE
DEFENDANT'S CONSTITUTIONAL RIGHTS.

The grand jury testimony was not transcribed [R. T. 64.]

The following language in Loux v. United States, 389 F.2d 911 (9th Cir. 1968) (cert. denied 393 U.S. 867) is dispositive of the defendant's first contention that the lack of such a transcript violated her constitutional rights:

"The law does not require that the testimony of witnesses before a grand jury be recorded or transcribed. Rule 6(d), F.R.Crim.P is permissive, not mandatory. Every court that has considered the question has so held. United States v. Caruso, 2 Cir., 1966, 358 F.2d 184, 186; United States v. Cianchetti, 2 Cir., 1963, 315 F.2d 584, 591; United States v. Martel, D.C.N.Y., 1954, 17 F.R.D. 326 (cited with approval in Cianchetti, supra); United States v. Hensley, 6 Cir. 1967, 374 F.2d 341, 352; Welch v. United States, 10 Cir., 1966, 371 F.2d 287, 291. Nor is there support for the claim that failure to record grand jury testimony violates the defendants' constitutional rights. United States v. Cianchetti,

supra, and United States v. Hensley, supra, are to the contrary. See also Lawn v. United States, 1958, 355 U.S. 339, 349-350, 78 S.Ct. 311, 2 L.Ed.2d 321; Costello v. United States, 1956, 350 U.S. 359, 363, 76 S.Ct. 406, 100 L.Ed. 397. " 389 F.2d at 916.

See also Jack v. United States, 9th Cir. No. 23171, decided March 25, 1969.

B. THE GRAND JURY INDICTMENT WAS VALID.

The defendant, for the first time on appeal, contends that the indictment was invalid. Her contention is based on speculation that no evidence of the illegal importation of the heroin in question was presented to the grand jury.

The defendant is foreclosed from attacking the indictment on appeal since she failed to move in the trial court for a dismissal of the indictment. Rule 12(b)(2), Federal Rules of Criminal Procedure; United States v. Messina, 388 F.2d 393, 394 (2nd Cir. 1968).

Unsupported suspicions of what evidence might have been used by a grand jury will not vitiate an indictment. Huerta v. United States, 322 F.2d 1, 2 (9th Cir. 1963), cert. denied 376 U.S. 954. Moreover, the legal presumption in §174, Title 21, United States Code, to the effect that possession of heroin by the

defendant is sufficient evidence at trial of knowledge of the illegal importation of the drug renders such a presumption, a fortiori, more than sufficient to support the return of an indictment by a grand jury. See United States v. Adams, 293 F.Supp. 776, 787 (S.D.N.Y. 1968). Additionally, it is well-settled that an indictment cannot be invalidated on the basis that inadequate or incompetent evidence was presented to the grand jury. Lawn v. United States, 355 U.S. 339, 349 (1958); Costello v. United States, 350 U.S. 359, 360 (1955); Wood v. United States, 405 F.2d 423, 425 (9th Cir. 1969); Johnson v. United States, 404 F.2d 1069, 1070 (9th Cir. 1969).

C. THE WARRANTLESS ARREST OF THE
DEFENDANT WAS BASED ON REASON-
ABLE GROUNDS AND WAS THEREFORE
PROPER; THE SUBSEQUENT SEARCH
AND SEIZURE WAS PROPER AS IT WAS
INCIDENTAL TO THE ARREST.

The authority of Agent Durel to effect the arrest of the defendant must be determined by federal law. Miller v. United States, 357 U.S. 301, 305 (1958). Section 7607(2) of Title 26, United States Code, defines the authority of Bureau of Narcotics agents to make warrantless arrests. That section provides:

"The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401(1) of the Tariff Act of 1930, as

* * *

(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation. "

"Reasonable grounds" as used in that section is substantially equivalent to "probable cause" as that term is used in the Fourth Amendment to the United States Constitution. Draper v. United States, 358 U.S. 307 (1959); Redmon v. United States, 355 F.2d 407 (9th Cir. 1966). It is the Government's contention that Agent Durel had ample "reasonable grounds" to believe the defendant had violated the narcotics laws on July 28, 1966, August 29, 1966, and October 13, 1966 when he arrested her on the latter date.

The following is a summary of the information in the possession of Agent Durel at the time of his arrest of the defendant on October 13, 1966:

a) He had been advised by fellow Bureau of Narcotics agents that they had observed David Gonzalez (the defendant's co-indictee) in a heroin transaction on July 28, 1966, and that a

1961 Chevrolet - license KIJ 959 - was involved in the transaction

[R. T. 68, 73-74].

b) Agent Durel had been further advised by fellow agent Herbert Emrod that Gonzalez had engaged in a hand-to-hand heroin transaction with a woman on August 29, 1966, and that the same vehicle mentioned in (a) had been used during that transaction [R. T. 68, 71-72, 75].

c) Agent Durel had been shown a photograph of the defendant by Agent Emrod who advised that she was the woman who engaged in the hand-to-hand transaction with Gonzales on August 29, 1966 [R. T. 71].

d) Durel had knowledge that the objects involved in both the July 28 and August 29 transactions had been analyzed by the U. S. Chemist as heroin [R. T. 76].

e) Durel had knowledge that the car involved in both the July 28 and August 29 transactions was registered to the defendant [R. T. 68].

f) Durel had observed Gonzalez on October 13, 1966, leave the vehicle containing Agent Borquez and an informant and disappear behind the residence at 622 McBride Street. He further observed Gonzalez reappear in twenty minutes, subsequent to which he approached the car containing the agent where he was advised that recorded money previously given to Gonzalez was gone and that what appeared to be narcotics had been taken from Gonzalez [R. T. 69, 70].

g) On October 13, Agent Durel had observed the

automobile (1961 Chevrolet - license number KIJ 959) involved in the July and August transactions parked in the driveway of 662 McBride Street [R. T. 69].

h) Agent Durel, on October 13, asked a woman at one of the two residences in back of 662 McBride Street what her name was. He then knocked on the door of the other residence (662-1/2 McBride) in back of 662 McBride. He asked a man who opened the door if the defendant was there; he was advised she was in the bedroom. Durel thereafter entered the house and effected the defendant's arrest [R. T. 70, 84].

"Probable cause to arrest the defendant existed if the facts and circumstances within the arresting officer's knowledge and of which he had reasonably trustworthy information prior to the arrest were sufficient in themselves to warrant a man of reasonable caution in believing that an offense had been or is being committed by such a person. "

United States v. Cleaver, 402 F.2d 148, 151

(9th Cir. 1968), citing Brinegar v. United States, 338 U.S. 160 (1948).

It can hardly be argued that the facts and circumstances within the knowledge of Agent Durel were not sufficient under the test just cited. He had information from fellow agents who had observed two previous transactions involving co-defendant Gonzalez

that her car had been used in the first transaction and that she had engaged in a hand-to-hand heroin transaction on the second occasion. Moreover, on October 13, 1966, this previous information was corroborated by Durel's observation of the defendant's car in close proximity to the residence in which she was arrested, by his observation of Gonzalez disappearing into an alley leading to the defendant's residence, by his being advised that Gonzalez had just bought heroin, and by the statement of the man who answered the door at 662-1/2 McBride Street that the defendant was inside.

Mangaser v. United States, 335 F.2d 971 (9th Cir. 1964), the only decision relied on by the defendant, is distinguishable in that there the facts disclosed only the possibility that the defendants had engaged in a narcotics transaction in the context of a situation where the arresting officers had no information that the appellants had ever before been involved in narcotics violations. Here, to the contrary, Agent Durel had abundant information of the prior involvement of the defendant in narcotics transactions, which information when tied together with the corroborating evidence he personally gathered on October 13 in the vicinity of the defendant's residence surely would warrant a man of reasonable caution to believe the defendant had committed a felony. All information in the agent's possession, fair inferences therefrom, and observations made by him are pertinent. Ng Pui Yu v. United States, 352 F.2d 626, 631 (9th Cir. 1965).

The subsequent search and seizure of the defendant, resulting in the recovery of recorded government funds, was

consequently valid as it was incidental to the valid arrest of the defendant. United States v. Rabinowitz, 339 U.S. 56, 60 (1950); Cotton v. United States, 371 F.2d 385, 393-94 (9th Cir. 1967).

As a final consideration touching on the arrest and subsequent search on October 13, 1966, the defendant questions the entry of Agent Durel into her residence. She relies on Sabbath v. United States, 391 U.S. 585 (1958).

This same question was considered by the Ninth Circuit in Ng Pui Yu v. United States, supra. There federal narcotics officers entered the apartment dwelling of the defendant through an open door without stating their authority or purpose.^{3/} The court held that the officers' entry through the open door did not invalidate the subsequent arrest, reasoning that no "breaking" could occur by reason of passage through an open door and that consent to enter was not required. Ng Pui Yu v. United States, supra, at 632. This rationale was earlier approved by the Supreme Court in Miller v. United States, 357 U.S. 301 (1957), at 308, where the court, in discussing the meaning of "breaking", referred to the common law requirement for burglary that the breaking must entail some physical force.

In Sabbath, relied on by the defendant, the issue was whether the petitioner's arrest was invalid because federal officers opened the closed but unlocked door of petitioner's apartment and entered in order to arrest him without first announcing their identity and

^{3/} An announcement of purpose and authority is required before federal officers may break into a residence. Section 3109, Title 18, United States Code.

purpose. The facts in Sabbath are essentially different because there the door through which entry was made was not open. But the court did discuss the question of what constituted a breaking by stating again, as it had in Miller, that the common law burglary elements applied and that some physical force was necessary to result in a breaking. Sabbath v. United States, supra, at 833 and 834.

Since Agent Durel did not use any physical force to effect his entry into the defendant's residence, but simply walked through an open door, his entry was legal and the subsequent arrest and search were valid [R. T. 70].

D. AGENT BORQUEZ'S TESTIMONY CONCERNING
STATEMENTS OF THE INFORMANT AND THE
CO-DEFENDANT WERE PROPERLY ADMITTED
INTO EVIDENCE.

During the testimony of Narcotics Agent Sergio Borquez, he testified once as to a statement made to him by an informant and at other times to statements made by co-defendant Gonzalez. First, Borquez testified as follows regarding the July 28th transaction:

"The information [sic], Manuel Martinez, he came back to where I was waiting at the corner and he made me aware that we were to come back in about a half hour because the woman had not arrived with the heroin that we were to get. So we waited there in the truck." [R. T. 123, lines 10-14.]

Then, with regard to the August 29 transaction, Borquez testified as follows:

"Well, the same agents again met with the informant at Florence and Alameda where we usually met, and on this occasion the informant telephoned No. 587-1781, and with his permission I listened on a twin phone to this conversation. He asked for Froggy and Froggy answered 'Yes, this is Froggy.' Then he asked Froggy if he could score some heroin . . .

"If he could purchase some heroin, and Froggy told him -- Mr. David Gonzalez told him that he would have to come up and pick him up and take him over to meet with the woman."

[R. T. 127, lines 20-25; 128, lines 1, 7-10.]

On three subsequent occasions, Agent Borquez testified to statements of co-defendant Gonzalez. ["the woman was on her way," R. T. 129, line 21; again that "she was on her way," R. T. 130, line 8; and finally that "the woman did not trust him and that he [Gonzalez] had to have the money first," R. T. 134, lines 10-11]. The first two statements related to the August 29, 1966 transaction and the third to the October 13, 1966 transaction. The defendant objected to the first two statements of Agent Borquez on the basis of hearsay. His objections were overruled [R. T. 123, lines 15-16;

R. T. 128, lines 11-12]. She failed to object to Agent Borquez's remaining statements. The defendant now urges that the admission of these statements denied her a fair trial because of their hearsay nature and because they denied her the right of confrontation of witnesses.

The defendant cannot now attack the admissibility of evidence to which she failed to object at trial. Montgomery v. United States, 9th Cir. , No. 22461, decided February 28, 1969; United States v. Della Rocca, 388 F.2d 525, 527 (2d Cir. 1968). To the first two of Agent Borquez's statements to which she objected on the basis of hearsay, the trial court properly ruled that they were admissible:

"It is not to be considered by the jury as any evidence of the fact itself, just merely explains why he [the informant] waited and the sequence of events."

[R. T. 123, lines 22-25].

" . . . this is not competent evidence of the fact, if it is a fact, that his source was a woman. But, it is only evidence which will permit you to follow the sequence of events . . . You should not consider them as proof of the fact that his [co-defendant Gonzalez] source was a woman."

[R. T. 128, lines 18-25].

Such statements were admissible as relating to the subsequent conduct of Agent Borquez. McCormick, Evidence

(1954), pp. 464-465; United States v. Annunziato, 293 F.2d 373, 377 (2d Cir. 1961), cert. denied 368 U.S. 919.

Except for the first statement of Agent Borquez concerning what the informant had told him, the remaining statements related to what co-defendant Gonzalez had told the agent. These remaining statements were admissible against the defendant as independent evidence of a concert of action between the accomplice and the defendant. For this purpose, the evidence need not show a criminal conspiracy. Williams v. United States, 289 F.2d 598, 601 (9th Cir. 1961). In order that such statements be deemed admissible, it is not necessary that the indictment allege that there was a conspiracy. Enriquez v. United States, 338 F.2d 165, 167-168 (9th Cir. 1964); Ortiz v. United States, 318 F.2d 450, 451-452 (9th Cir. 1963).

The admissibility of the statements in question remain unaffected by the recent decisions of the Supreme Court relating to the right of defendants to the confrontation of witnesses. Bruton v. United States, 391 U.S. 123 (1967); Barber v. Page, 390 U.S. 719 (1967); Douglas v. Alabama, 380 U.S. 415 (1964); Pointer v. Texas, 380 U.S. 400 (1964). Both the Barber and Douglas decisions, ruling hearsay testimony inadmissible where that testimony was not subject to cross-examination, specifically allude to the fact that the hearsay testimony was inadmissible under traditional rules of evidence. Barber v. Page, supra, at 723; Douglas v. Alabama, supra, at 418. Here, as has been pointed out, the questioned testimony was admissible under the

rules of evidence. In Bruton, supra, at 128, footnote 3, the court states:

"We emphasize that the hearsay statement inculpatng petitioner was clearly inadmissible against him under traditional rules of evidence, see Krulewitch v. United States, 336 U.S. 440; Fiswick v. United States, 329 U.S. 211, the problem arising only because the statement was (but for the violation of Westover, supra, n. 1) admissible against the declarant Evans. See C. McCormick, Evidence §239 (1954); 4 J. Wigmore, Evidence §§1048-1049 (3d ed. 1940); Morgan, Admissions as an Exception to the Hearsay Rule, 30 Yale L. J. 355 (1921). See generally Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159 (1954); Note, Post-Conspiracy Admissions in Joint Prosecutions, 24 U. Chi. L. Rev. 710 (1957); Note, Criminal Conspiracy, 72 Harv. L. Rev. 920, 984-990 (1959). There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause. See Pointer v. Texas, 380 U.S. 400; Barber v. Page, 390 U.S. 719; Mattox v. United States,

156 U.S. 237. See generally McCormick, supra, §224; 5 Wigmore, supra, §§1362-1365, 1397; Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177 (1948). "

The defendant cites Doty v. United States, 3 Cr. L. 2220 (10th Cir. 1968), for the proposition that the contents of a telephone conversation between an informant and co-defendant are not admissible without the consent of both parties to the call. The court held in Doty, rather, that the introduction of a tape recording of a conversation between an informant and the defendant was improper because no prior approval by judge or magistrate was sought or obtained. However, it is the law of this Circuit Court of Appeals that such a tape recording is admissible upon the consent of one of the parties. Jack v. United States, 387 F.2d 471, 472 (9th Cir. 1967); Garrett v. United States, 382 F.2d 768, 771 (9th Cir. 1967).

The facts in this case are essentially different. No tape recording was admitted into evidence. Agent Borquez simply testified to a telephone conversation between Gonzalez and the informant that he overheard with the consent of the informant [R. T. 127]. It is well established that such testimony is admissible. Rathbun v. United States, 355 U.S. 107, 110 (1957); United States v. Caci, 401 F.2d 664, 670-71 (2d Cir. 1968).

The court instructed the jury, in line with the language of §174 of Title 21, United States Code, that:

" . . . This statute [Section 174] also provides that whenever on trial for a violation of this statute the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." [R. T. p. 236].

The defendant attacks this instruction on two grounds:

(1) the statutory presumption is unconstitutional, and (2) the defendant was not shown to have had possession of the heroin, to permit the statutory presumption. As authority for the first ground, the defendant cites United States v. Adams, 293 F.Supp. 776 (S.D.N.Y. 1968). Without conceding the correctness of the Adams decision, that case is clearly distinguishable for it deals with the statutory presumption of illegal importation of marihuana under §176(a) of Title 21, United States Code. The court's opinion was primarily based on a finding that marihuana, unlike heroin, was grown in considerable quantity in this country. Moreover, it has

been consistently held that the statutory presumption dealing with heroin in §174 is constitutionally valid. Yee Hem v. United States, 268 U.S. 178, 184 (1925); Jones v. United States, 400 F.2d 134, 136 (9th Cir. 1968); Ramirez v. United States, 350 F.2d 306 (9th Cir. 1965).

The defendant's second ground, that the defendant did not have possession of the heroin, overlooks the instruction on possession given by the court:

"The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. A person who although not in actual possession knowingly has the power and intention at a given time to exercise the dominion and control over a thing either directly or through another person or persons is then in constructive possession of it." [R. T. 237, lines 9-17].

Clearly the jury could have found that the defendant, if not in actual possession, had constructive possession of the narcotics. In fact, she was observed to hand a package to Gonzalez on August 29, 1966, later determined to contain heroin, thereby indicating actual possession. As to the October 13, 1966, transaction, Gonzalez appeared from the area of her residence with a package of heroin and the defendant was later found in the possession of the

money given previously to Gonzalez to purchase the narcotics.

From this, the jury could reasonably have determined that she was in constructive possession of the heroin.

F. THERE IS SUFFICIENT EVIDENCE TO
 SUPPORT THE GUILTY VERDICT.

The defendant failed to move for a judgment of acquittal at the close of all the evidence [R. T. 190]. She is therefore foreclosed on appeal from attacking the sufficiency of the evidence unless review would be necessary to prevent a manifest miscarriage of justice. Rule 29, Federal Rules of Criminal Procedure; Beckett v. United States, 379 F.2d 863, 864 (9th Cir. 1967).

Clearly the record here convincingly establishes the guilt of the defendant as to the transactions of August 29, 1966 and October 13, 1966. She was observed on the former date to hand a package to David Gonzalez which was later determined to contain heroin and, as to the latter date, Gonzalez was observed to disappear into the area of her residence and return with a package of heroin. She was later found to be in the possession of the money that was earlier given to Gonzalez by narcotics agents.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

MICHAEL J. LIGHTFOOT
Assistant U. S. Attorney

Attorneys for Appellee
United States of America

NO. 22125 /

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDIS W. PEROVICH, aka
W. PEROVICH CONSTRUCTION
COMPANY,

Appellant,

v.

LININGS, INC., et al.,

Appellees.

*See Vol.
3467*

APPELLANT'S REPLY BRIEF

ANNA & FITTING

J. WEINSTEIN

MR. E. PECK

227 West Fifth Street

Los Angeles, California 90013

Attorneys for Appellant Edris W.
Perovich, aka W. W. Perovich
Construction Company

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APPELLEE'S ACCOUNT OF EVENTS LEADING UP TO THE DISTRICT COURT'S ORDER OF DISMISSAL CANNOT OBSCURE CERTAIN BASIC FACTS WHICH COMPEL THE CONCLUSION THAT DISMISSAL OF THE ACTION BELOW CONSTITUTED AN ABUSE OF DISCRETION.

1

NO AUTHORITY CITED BY APPELLEE ALTERS APPELLANT'S CONCLUSION THAT THE DISMISSAL OF THE ACTION BELOW CONSTITUTED AN ABUSE OF DISCRETION.

8

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17

APPELLEE MISCONCEIVES THE NATURE OF APPELLANT'S MOTION TO AMEND THE COMPLAINT, MODIFY THE PROTECTIVE ORDER, AND OBTAIN MODIFICATION AND/OR CLARIFICATION OF CERTAIN DISCOVERY PROCEEDINGS.

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CONCLUSION.

30

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UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

RIS W. PEROVICH, dba B. W.)	
OVICH CONSTRUCTION CO.,)	
)	
Appellant,)	
)	
v.)	APPELLANT'S REPLY BRIEF
)	
E LININGS, INC., et al.,)	
)	
Appellees.)	
)	

I

APPELLEE'S ACCOUNT OF EVENTS LEADING UP TO
THE DISTRICT COURT'S ORDER OF DISMISSAL CANNOT
OBSCURE CERTAIN BASIC FACTS WHICH COMPEL THE
CONCLUSION THAT DISMISSAL OF THE ACTION BELOW
CONSTITUTED AN ABUSE OF DISCRETION.

Appellee's account of the events leading up to the entry
the order of dismissal cannot obscure certain facts which,
hough set forth in Appellant's Opening Brief, are so crucial
the proper determination of the instant appeal that they bear
teration.

First, nothing which occurred prior to Appellant's dis-
arge of his counsel in December of 1966 -- just a few months
or to entry of the order of dismissal -- could even remotely

justify dismissal of the action for lack of diligent prosecution or failure to comply with court orders. United's insinuation to the contrary notwithstanding, it is clear that at all times Perovich bore the burden of prosecution with full fidelity to his obligations to the Court and opposing counsel.^{1/}

Second, the District Court itself acknowledged that the act of Perovich which arguably did delay the prosecution of the action, his discharge of a sole-practitioner attorney who had exhausted himself in the course of trying to get the action below related actions to trial, was not done for disruption or delay. The Court found that it was the result of "a sudden hasty decision based upon irritation, not upon reason"; and it did not warrant dismissal. [R.T. 1/17/67, page 73, line 1 to page 174, line 6].

Third, Appellant's failure to file a trial brief within the time set by the District Court was not the result of indifference or obstructionism. On the contrary, at all times after new counsel entered the case in January of 1967, Appellant prosecuted the action vigorously and in the manner which Appellant believed was most

Appellee seeks to impart the impression that the District Court was dissatisfied with the way in which Perovich's former counsel, Joseph Hall, Esq., conducted the case [Appellee's Brief, pp. 9-10; Exhibit B]. While the Court may have criticized Hall on a few particulars, its overall impression of Mr. Hall is evidenced by the manner in which it complimented him as "a hard working man" [R.T. 12/13/66, p. 58, line 15] and "felt he was pacing himself too hard and I told him not to kill himself." [R.T. 3/18/67, p. 17, lines 1-3; see Appellant's Opening Brief, page 10, footnote 5].

kely to produce a final disposition of his claim on its
merits, not upon the basis of some defect in the presentation
that claim.

Both Appellee and the District Court in its
memorandum of Dismissal lay great stress upon Appellant's
promise to have the trial brief filed by a given date [C.T.
page 3967, lines 1-32; Appellee's Brief, pages 14-16].

Appellant does not mean to minimize the significance
promises which a litigant makes to a court in the course
litigation. They create serious responsibilities and a
court acts properly in treating their breach as a grave matter
deed. But, nevertheless, when a litigant does fail to abide
a promise, the court, in determining whether or not it is
appropriate to penalize him for doing so, must consider the
circumstances out of which the failure arose and the consequences
the failure both upon the court and other litigants.

When Perovich's attorney, Les J. Weinstein, Esq.,
accepted April 4 as the deadline for filing the trial brief,
there is no reason to believe that he did so with anything
other than complete good faith. If the facts were otherwise,
could Mr. Weinstein, an experienced antitrust lawyer, have been
so ingenuous as to characterize the Court's action in giving
him until this date as "more than generous"?^{2/}

Appellee contends that "at least two of the motions [which

Once Mr. Weinstein got deeply into the case, however, became convinced that unless Perovich was granted certain relief, ability to prepare an adequate trial brief would be materially impaired. At this point, Appellant, if he may be permitted

(cont'd.)

Appellant subsequently made] had been contemplated by new counsel before he undertook the Perovich representation" [Appellee's Brief, page 20]. The contention is based upon an alleged conversation between Mr. Weinstein and United's counsel, described in an unverified memorandum, in which Mr. Weinstein supposedly "stated that if he undertook to represent the Perovich plaintiffs, he would seek to undo certain prior rulings, specifically mentioning the protective order regarding defendants' documents and the order relating to the relevancy of evidence of concrete pipe agreements" T. 3760, lines 8-12].

Appellant will leave the propriety of attorneys using casual statements of opposing counsel in the manner in which Mr. Weinstein's alleged statement was used by United's counsel to the court's judgment.

Be that as it may, and regardless of what statements Mr. Weinstein did or not make to United's counsel, undoubtedly Mr. Weinstein was giving thought to a variety of courses of action and would he become counsel for the plaintiffs, including the motions question. It does not follow from this, however, that Mr. Weinstein was committed to those motions on January 18, when he accepted the April 4 deadline for the trial brief. He had just been through a hearing which was clearly sufficient to bring about a change in any tentative plans which he might have had regarding the prosecution of the action. Until Mr. Weinstein actually got deeply into the case he could not have known how essential the relief which he allegedly mentioned to United's counsel was to his case, and as of the date on which he accepted the April 4 deadline he did not even have a complete set of files in his possession. [See Appellant's Opening Brief, pages 45-46].

e to a metaphor, found himself at a "fork in the road." One consisted of foregoing the necessary relief, taking a gamble case in which approximately four years of court and attorneys' and a very large sum of money had been invested, and preparing a possible brief under the circumstances. Naturally, such a might lead to ultimate failure, not because Appellant's case lacked but because he was deprived of the opportunity to prove the merit it had. (Again, as Appellant pointed out in his Opening Brief, it would be difficult to exaggerate the importance of the trial brief and the ultimate disposition of the action below and the related actions. It was a detailed blueprint for the conduct of the trial amounting to the presentation of the Plaintiffs' cases on paper, and its completion would, in effect, mean that the Plaintiffs were ready for trial.) [C.T. 3203, to 3204, line 14; Appellant's Opening Brief, pp. 8-9].

The other path consisted of not gambling with a case in which so much time and money had already been invested, not preparing a very inadequate trial brief, but of attempting to serve the ultimate purpose of the judicial process, a disposition on the merits, and the motions required to obtain the necessary relief.

It may be that Appellant was not entitled to the relief sought by his motions. It may be, as Appellee urges, that Perovich's right to amend the complaint to allege an attempt to monopolize was waived by the failure of their exhausted attorney to file the proposed amendment a few months earlier [Appellee's Brief, pages 18-19, 60-61].

It may be that the District Court acted properly in denying Appellant's motion for modification of the protective order which excluded Perovich and the president of a corporate plaintiff

a related case, Charles Davin, from seeing some 90,000 documents which the Defendants had produced during the course of discovery, and though there was overwhelming evidence that the documents were intelligible to Appellant's counsel and the only two persons who for a practical matter were available to assist Appellant's counsel in interpreting the documents were Perovich and Davin; and even though the justification for the protective order, the protection of trade secrets, did not seem to require the Defendants to obtain a protective order against each other [See Appellant's Opening Brief, pages 51-53].

It may be that the District Court was right in denying Appellant's motion for clarification and/or reconsideration of its orders on certain discovery matters, even though it had granted precisely the relief which Appellant sought in other "western cases" and even though the ruling would appear to be erroneous under the decision of the United States Supreme Court in Continental Co. v. Union Carbide, 370 U.S. 690, 698-700 (1962) [See Appellant's Opening Brief, page 54].

But so what? Can it be said that Appellant acted beyond the pale of reason in seeking such relief; that there was no reasonable possibility that he was entitled to the relief? Even the District Court which ultimately denied the motions, acknowledged that there was a possibility that they would be granted [R.T. 3/18/67, page 79, line 18 to page 80, line 21]; and an examination of the briefing papers, the papers in opposition, and the proceedings before the District Court revealed that they were a matter of serious consideration and that Appellant's right to the relief sought was, at

least, arguable [C.T. page 3634-3841; R.T. 4/6/67, morning, pages 7; afternoon, pages 1-60].

Had the motions been granted, it was clear from the District Court's own statements that Appellant would have to given additional time [R.T. 3/18/67, page 77, lines 17-21] prepare the trial brief. Thus Appellant's right to continue the case was, in effect, made contingent upon the outcome ancillary motions.

Fourth, Appellant's election to make the motions in question consequent failure to comply with the District Court's deadline not result in a disruption in the District Court's calendar materially prejudice the defendants. Had the District Court been forced to postpone a scheduled trial because of the unavailability of the trial brief, perhaps the situation would have been different. But here no date for the trial of the action had been set and in fact the District Court had plainly indicated that the case might not be tried until the following year [R.T. 7/67, page 175, line 16 to page 176, line 2]. Similarly, it is difficult to conceive of any substantial prejudice to United States arising from the brief not being filed. Undoubtedly, the memory of attorneys and witnesses with respect to relevant facts dims with time goes on [see Appellee's Brief, pages 22-23]; but, after all, it seems unlikely that memories refreshed in October and November of 1966 in connection with alleged "substantial preparation" for depositions would be a great deal dimmer in June of 1967 than they were in April of 1967. In any event, some delays are inevitable in litigation; unless they are unreasonable,

by are simply something with which the parties must live.

Fifth and finally, once the motions were denied, Appellant did not ask for an extension until some remote future date to file the trial brief. It offered to have the required trial brief filed by May 15, 1967, a date only approximately three weeks after the date on which the trial court entered its order of dismissal. [C.T. 3935, line 19 to page 3936, line 9]. It is true, as Appellee asserts, that "subsequent diligence is no excuse for past negligence" [Appellee's Brief, page 55]. But where was the negligence here?

Appellee's suggestion that this offer was a "ploy", an insincere effort to make Appellant's position "look better" on appeal [Appellee's Brief, page 38], is, Appellant submits, preposterous and totally unwarranted. If Appellee really believed that was only a "ploy", why didn't it call the bluff by withdrawing its motion to dismiss? Certainly United would have been in no worse position by waiting another month or two for entry of an order of dismissal, and its contention that dismissal was warranted would have been greatly enhanced. The reason it did not do so was obvious --- United was afraid that Appellant would indeed file a trial brief.

II

NO AUTHORITY CITED BY APPELLEE ALTERS APPELLANT'S CONCLUSION THAT THE DISMISSAL OF THE ACTION BELOW CONSTITUTED AN ABUSE OF DISCRETION.

Appellee begins his argument with the statement that "A

al Court's Dismissal For Failure To Comply With Orders of the
ort or for Failure to Prosecute Will Be Reversed Only If The
ort Has Abused Its Discretion" [Appellee's Brief, page 39].

This is, of course, a correct statement of the law.
ellant would point out, however, that it is such an abuse of
cretion to dismiss in any but extreme cases. As stated in
ham v. Florida East Coast Railway Co., 385 F.2d 366 (5th Cir.
7):

"But '[t]he sanction of dismissal is the
most severe sanction that a court may apply, and its
use must be tempered by a careful exercise of
judicial discretion.' Durgin v. Graham, 1967, 5th
Cir., 372 F2d 130, 131. The decided cases, while
noting that dismissal is a discretionary matter,
have generally permitted it only in the face of a
clear record of delay or contumacious conduct by the
plaintiff. [citations]" (385 F.2d 368).

Appellee then proceeds to boldly proclaim that "[t]here
a number of cases closely resembling the Perovich case in
ch the trial court has dismissed an action, and those dismissals
ve been uniformly upheld on appeal." [Appellee's Brief, page

An examination of the numerous cases cited by Appellee,
ever, reveals that neither individually nor collectively do they
ar out this contention. What Appellee has done, apparently, is
fix upon certain superficial similarities between the cases which

cites and the instant case, while retaining myopic to fundamental distinctions.

Appellee characterizes Grunewald v. Missouri Pacific Railroad Co., 331 F.2d 983 (8th Cir. 1964) -- one of the cases upon which Appellee appears to rely most heavily -- as "[b]earing a striking resemblance" to the instant case, apparently because it involved successive continuances and substitutions of counsel. [Appellee's Brief, page 41]. What he ignores, however, is that in Grunewald there was apparently a fifteen-month hiatus during which, so far as appears from the opinion, nothing substantial was done to advance the case to trial. In the instant case, of course, Appellant was working constantly toward bringing the case to a final adjudication. More than that, Grunewald concerned a failure to file a trial brief on a given date, but a failure to be prepared for a scheduled trial. The latter is obviously more disruptive to the administration of justice and prejudicial to opposing counsel than the former.

In another case upon which Appellee relies heavily, Reffior v. Lansing Drop Forge Co., 124 F.2d 440 (6th Cir. 1942), dismissal was based on derelictions far more extreme than any which Perovich is guilty, and far greater prejudice to the defendant than any which United suffered here. In Reffior, trial was actually begun ten months after the filing of the action and approximately five years prior to the dismissal. Following commencement of the trial, there were long hiatuses -- in the aggregate a matter of years -- during which apparently nothing

ll was done to advance the case to final determination, despite fact that restraining orders were in effect which materially impaired the ability of the defendant to conduct its business.

Two of the cases which Appellee cites, Hooper v. Chrysler, Inc. Corp., 325 F.2d 321 (5th Cir. 1963), cert.den., 377 U.S. 967, Blue Mountain Construction Co. v. Werner, 270 F.2d 305 (9th Cir. 1959), cert.den., 361 U.S. 931, involved situations in which there was a deliberate refusal by the plaintiff to proceed to trial. A court is obviously justified in dismissing under those circumstances, but that fact is irrelevant to the instant case. Here, prior to the entry of that order of dismissal, Appellant agreed to proceed with the case if only he was given to a date approximately three weeks after the date upon which the dismissal order was ultimately entered in which to prepare his trial brief.

Appellee asserts that "[a]nother aggravating factor justifying dismissal of the Perovich case was that plaintiff's refusal to pay sanctions and to proceed with the trial brief was deliberately," citing O'Brien v. Sinatra, 315 F.2d 637 (9th Cir. 1963). [Appellee's Brief, page 45].

Appellant agrees that the intent of the plaintiff is a relevant factor in determining whether dismissal is warranted. The interest of the Appellant was not to frustrate court proceedings but only to bring a case in which he had invested so much time and money to a disposition based upon its merits, not upon the inadequacy of its presentation.

Sandee Manufacturing Co. v. Rohm & Haas Co., 298 F.2d 41

h Cir. 1962) and Backer v. Safelite Glass Corp., 244 F.Supp.

(D. Kansas 1965), are cited by Appellee to support its attention that "courts have shown no hesitation in dismissing all antitrust damage cases, and certainly have not treated antitrust cases as something special [sic], less susceptible to dismissal when a plaintiff fails to prosecute or defies court orders." [Appellee's Brief, page 46].

Appellant agrees that courts have dismissed anti-trust actions on these grounds and has never argued to the contrary. Appellant does believe, however, that the fact that antitrust cases involve an important public policy and that an antitrust plaintiff must bear a particularly onerous burden are among the many factors which a court must take into account in determining whether or not dismissal is the appropriate remedy. Neither Sandee nor Backer indicate otherwise.

Appellee cites seven cases, Lovine v. Colgate-Palmolive Company, 283 F.2d 532 (2nd Cir. 1960), cert.den., 365 U.S. 821; Fitz v. Hooper-Holmes Bureau Inc., 327 F.2d 939 (5th Cir. 1964); Wage Machinery Company v. Hayssen Manufacturing Company, 260 F.2d 56 (7th Cir. 1959); Sleek v. J. C. Penney Company, 26 F.2d 209 (W. D. Pa. 1960); Fitzsimmons v. Gilpin, 368 F.2d 561 (8th Cir. 1966); Janousek v. Wells, 303 F.2d 118 (8th Cir. 1962); Dom v. Texas Company, 27 F.Supp. 992 (N.D. Ala. 1939) from which it generalizes that "failure to comply with a court order or failure to perform a step necessary to the continuation of the trial will furnish ample grounds to justify the trial court in

exercising its discretion to dismiss the action." [Appellee's
Brief, pages 46-47].

It is difficult to see how the cases, or indeed the
generalization drawn therefrom, contribute to the resolution of
the instant case. Obviously there are many cases in which "failure
to comply with a court order or failure to perform a step
necessary to the continuation of the case" has been held to justify
dismissal. Equally obviously, there are many cases in which these
reasons have been held not to justify dismissal. Thus the issue is
whether Appellant failed to comply with a court order or perform
a step necessary to the continuation of the case but whether,
in spite of that fact, dismissal was appropriate. The cases cited
by Appellee contribute little to the resolution of this question.

Levine v. Colgate-Palmolive Co., 283 F.2d 532 (2nd Cir.
1962), a one-paragraph opinion, was a case in which plaintiff
failed to appear at trial and in which the facts disclosed at
a pre-trial conference indicated that he did not have a valid
claim in any event.

Wirtz v. Hooper-Holmes Bureau, Inc., 327 F.2d 939 (5th
Cir. 1964) was a case in which the Secretary of Labor definitely
irrevocably refused to comply with a court rule requiring
plaintiff to provide the defendant with a list of the witnesses
planned to call. The situation was obviously far different
from that involved in the instant case.

Package Machinery Co. v. Hayssen Manufacturing Co.,
357 F.2d 56 (7th Cir. 1959), like Wirtz, involved an absolute

sal situation.

In Sleek v. J. C. Penney Company, 26 F.R.D. 209 (W.D. 1960), the plaintiff failed to file a pre-trial statement despite four notices from the court to do so.

Fitzsimmons v. Gilpin, 368 F.2d 561 (9th Cir. 1966) was a case in which a fifteen-month hiatus took place during which there was, so far as appears from the record, nothing done to move the case forward. When the court moved to dismiss the plaintiff's motion for a statement in opposition which "made no showing of cause why the action should not be dismissed" (368 F.2d 562).

In Janousek v. Wells, 303 F.2d 118 (8th Cir. 1962), the plaintiffs, to quote the court, "impeded the progress of the litigation by every obstacle and maneuver which their ingenuity could command" (303 F.2d 122) -- hardly the situation in the instant case.

Finally, the decision in Wisdom v. Texas Co., 27 F.Supp. 100 (N.D. Ala. 1939), is no more than an order of the District Court dismissing the action for plaintiff's failure to appear at a pre-trial conference. The action was not, so far as appears, subject to review in an adversary proceeding before the District Court or any other court.

Appellee's reliance upon Russell v. Cunningham, 233 F.2d 100 (9th Cir. 1956) seems manifestly misplaced. By the very language of the quotation from the case which Appellee sets forth [Appellee's brief, pages 47-48], the significant factor was that a very long period had passed during which no progress toward advancing the

to its ultimate disposition was made. In Perovich, on the other hand, except insofar as he was prevented from doing so by a stay order, progress toward getting the case to trial was always being made.

Appellees state that "[c]ases in which abuse of discretion in dismissing has been found bear virtually no resemblance to the Perovich case" [Appellee's Brief, page 48]. In fact, reversal of an order of dismissal may be warranted despite circumstances far more extreme than any even suggested by the instant case.

In Glo Co. v. Murchison and Company, 397 F.2d 928 (3rd Cir. 1967), reheard 1968, cert.den., 89 S.Ct. 290 (1960), for example, the action had been pending for eleven years when it was dismissed. During a large portion of this time virtually nothing was done to move the case toward final resolution. Indeed, for eleven years the plaintiff was still in the process of preparing interrogatories. The court warned the plaintiff's counsel on numerous occasions that unless he proceeded with the case it would be dismissed. The delay was severely prejudicial to the defendants in that during the eleven years that the case was pending two of the defendants' witnesses died, the last in the year in which dismissal was ordered. There was a court rule which authorized dismissal in cases in which no action was taken for a period of one year. Yet, notwithstanding all of the foregoing, the court of appeals, one judge dissenting, concluded "with the greatest reluctance that in view of the unusual nature of the circumstances of this case the interest of justice will best

served by affording plaintiff an opportunity to prove its
e at trial." (397 F.2d 929)^{3/}

Finally, Appellee argues that "Factors Urged by Plaintiff
Mitigation of His Conduct Have Been Rejected in Other Cases" and
ceeds to make such statements as "[a] new attorney is not en-
led to enter the case with a clean slate," "[a] party who might
e been prepared may not obtain a continuance merely because he
not prepared," "[e]fforts to settle an action do not constitute
pliance with court orders to prepare a brief," and "[d]elayed
ers to obey court orders do not constitute compliance" [Appellee's
ef, pages 50-55].

Appellant does not dispute these propositions as such
has never argued otherwise. Appellant does believe, however,
t the nature of the case, the reasons for the plaintiff's non-
pliance with a court order, the efforts which the plaintiff
made to advance the case to its ultimate resolution, and
willingness to comply in the future are manifestly factors
ch must be taken into account in determining whether or not

The "unusual nature of the circumstances" of which the Court
aks apparently refers primarily to the fact that "there appears
be no dispute that an amount of money is owed to plaintiff
er the contracts in suit." (397 F.2d 929). In the instant case,
re are also circumstances which militate against imposing the
alty of dismissal -- the advanced state of the case and the
e, money, and effort which have been invested in it.

trial court abused its discretion in ordering dismissal.
of the cases cited by Appellee are to the contrary.

III

APPELLEE'S INSISTENCE THAT APPELLANT WAS FINANCIALLY
ABLE TO PAY THE SANCTIONS ON THE APRIL 7 DUE DATE
IS UNSUPPORTED BY ANYTHING EXCEPT CONJECTURE AND,
PERHAPS, WISHFUL THINKING. IN ANY CASE THE POINT IS
GIVEN GROSSLY EXAGGERATED IMPORTANCE BY APPELLEE
SINCE THE FAILURE TO MAKE THE PAYMENT WAS PLAINLY
NOT A GROUND FOR DISMISSAL UNDER THE CIRCUMSTANCES.

Appellee argues long and volubly, devoting nearly one
quarter of its brief to the proposition, that, Appellant had the
money available to pay the sanctions on the due date of April
and voluntarily elected not to do so. [Appellee's Brief, pages
4-38].

The references in Appellant's Opening Brief to Appellant's
financial ability are based upon statements in the affidavits of
Appellant Datrix M. Perovich and W. Z. Jefferson Brown, Esq.
The affidavit of Perovich, dated March 16, 1967, stated in pertinent
part:

"5. The only assets that I have of any substantial
value which are not fully encumbered are my home and
certain equipment which I formerly used in connection
with the in-place lining and/or rehabilitation of
concrete pipe. I presently have no cash on hand,

in any bank, or otherwise, except for the sums necessary to feed and clothe my family and pay my next mortgage payment. I have no present source of income although I do believe that I will be able to borrow between \$5,000.00 and \$10,000.00 in the next 60 to 90 days. Accordingly, it is my request and desire that any sanctions the Court might impose against me in connection with the above captioned cases, not be made payable prior to August 1, 1967.

"6. I have spent almost all of my time since January 19, 1967 to date:

(a) In an effort to raise money to pay costs and expenses in prosecuting Civil Case No. 63-278-MP and Civil Case No. 63-279-MP.

(b) In an effort to raise money to pay my attorneys' fees and other expenses that were previously incurred in connection with that litigation.

(c) In an effort to raise money to pay the sanctions of approximately \$5,000.00, which I am informed by my attorneys will be levied by the Court against me and Inplace Linings, Inc.

(d) In consulting with my attorneys in connection with the above captioned cases."

[C.T. page 3714, line 32 to page 3715, line 25].

The affidavit of W. Z. Jefferson Brown, Esq., dated

il 18, 1967, stated, in pertinent part:

"2. On or about April 4 and 5, 1967, I and Les J. Weinstein, as attorneys for the plaintiffs, communicated with Batris W. Perovich and Charles O. Davin, plaintiffs in the within action. They were asked whether they were financially able to pay the sanctions imposed by the Court in the amount of \$656.15. They each responded that they were not financially able to do so and did not have the funds available to them to pay the sanctions." [C.T. page 3907 lines 12-18].

The information contained in these affidavits was collected in statements to the Court by Appellant's counsel [see, ., R.T. 4/6/67, afternoon, page 51, line 25 to page 52, line page 53, lines 3-5] and in a "Notice of Refusal to Pay Sanctions", dated May 11, 1967, which gave as one of the reasons for non-ment of the sanctions:

"The plaintiffs were financially unable to pay sanctions within the time ordered."

[C.T. page 3877, lines 3-4]^{4/}

In any event, Appellant does not regard the question his financial position on April 7 as of major importance in

The foregoing does not, of course, necessarily mean that it would have been impossible for Appellant to borrow the sum in question from his counsel (assuming such was ethically permissible) otherwise, or even that Appellant's liquid assets were less than the sum in question. But Appellant did not live in a financial straits in which the sanctions were his sole obligation, and obviously his other obligations would have to be considered in determining his financial ability to do anything.

disposition of this appeal because the sanctions were improperly assessed, and even assuming, arguendo, that they were properly assessed, Appellant did in fact offer to pay them eighteen days later. Appellant submits that the effect of Appellee's treatment of the financial ability point is to divert the Court's attention from facts which are far more significant to the disposition of the instant appeal.^{5/}

Be that as it may, however, Appellant will answer Appellee's arguments on the point. They are, Appellant submits, manifestly inadequate.^{6/}

First, Appellee attaches an affidavit to the Appellee's

The fourteen pages which Appellee devotes to the point contrasts sharply to the few passing references to it in Appellant's Opening Brief.

One of these arguments is based upon a representation by Mr. Perovich in documents which are before this Court, but outside the record on appeal, that the funds to pay sanctions were available on their due date and that he urged his counsel to make payment thereof; and upon a letter dated April 5, 1966 from Appellant's counsel addressed to Charles Davin, the President of Inplace Linings, Inc. in Texas, transmitting a check in the sum of \$10,000 payable to Inplace Linings, Inc., Batris W. Perovich and Northwest Linings, Inc., a corporation, of which Perovich was President.

So far as the letter is concerned, the check obviously required the signatures of all payees before it could be negotiated and the proceeds thereof available for any purpose whatever. Even assuming, arguendo, that the proceeds of the check were not committed to some other use, the letter in no way shows that the check had been signed by all payees and honored by the drawee bank or that the proceeds were available to Appellant on April 7.

So far as Mr. Perovich's representation is concerned, Appellant only point out, as it did in Appellant's Opening Brief, (page 17, footnote 17) that the representation is contrary to the record on which this case is being appealed.

of which alleges that, in March of 1962, Appellant received \$80,000.00 in settlement of a prior action against United and other defendants. Appellee's logic, apparently, runs something as follows: Since Mr. Perovich had \$80,000.00 in March of 1962, it necessarily follows that he had the few hundred dollars required to pay sanctions against United five years later, in April of 1967.

A litigant may not augment the record on appeal by bringing before the appellate court facts which were clearly known to the litigant during proceedings in the court below. See Cockrell v. ..., 375 F.2d 889, 891 (5th Cir. 1967); Cash v. Murphy, 339 F.2d 757, ... (5th Cir. 1964). Hence, in view of the aversion to affidavits which Appellee demonstrated throughout proceedings in the District Court, despite Appellant's vehement objections, Appellee's recourse to an affidavit on appeal when its use is improper is ironical.

In any case, the absurdity of Appellee's logic is self-evident and requires no further comment.^{7/}

Second, to establish "Mr. Perovich's history of making false and incredible statements" [Appellee's Brief, p. 30], Appellee takes the Court through an awkward excursion on a totally

In fact, the proposition is so palpably absurd that Appellant is forced to suspect that Appellee's true purpose in attaching the affidavit is to prejudice the court against Appellant by implying that Appellant is a vexatious litigant who ought to have been satisfied with one recovery without attempting to obtain another. But this sort of contention cuts both ways. Appellant could suggest that since the parties presumably do not pay \$80,000 for nothing, and since the prior case involved, inter alia, a conspiracy to restrain trade, the fact of the prior settlement lends itself the inference that Appellant has a meritorious claim in the instant case.

elated Ninth Circuit decision, Perovich v. Glen Falls Insurance
pany, 401 F.2d 145 (9th Cir. 1968), in which this Court found
t a jury verdict that Perovich misrepresented the value of stolen
ds on an insurance claim was supported by the evidence, and
n quotes as "[a]n example of an incredible piece of testimony
Mr. Perovich" [Appellee's Brief, p. 31], three pages of Perovich's
timony at deposition dealing with matters which have no direct
ring whatever upon the questions which are presented by the
tant appeal.

The question of the propriety of attacking credibility in
appellate court aside, Appellee's insinuation that the testimony
en by Mr. Perovich at his deposition is untrue appears to rest
nothing more than speculation. So far as the Glen Falls opinion --
ch came down after the trial court entered its order of dismissal --
concerned, it is merely conjecture to say that because Perovich
rvalued property for purposes of an insurance claim he misrepres-
ted his financial situation to the District Court.^{8/}

Thirdly, Appellee refers to statements by it in a trial
rt memoranda that Charles Davin, the president of another
ntiff, a corporation against which the sanctions were assessed,
ned and operated a two-engine airplane and lived on a tree-lined
ate overlooking a lake";^{9/} and that "Mr. Perovich received a
stantial annual income from certain gravel pit operations and

Moreover, what slight evidentiary value such a fact may have,
is greatly outweighed by its inflammatory and prejudicial
racter.

For a discussion of the propriety of imposing the sanctions
inst this corporate plaintiff, see Appellant's Opening Brief,
58, footnote 40.

and a substantial equity in a luxury home in San Marino, California." Appellee's Brief, p. 30].

The irrelevancy of such facts, even if true, to establish that Perovich or its corporate co-plaintiffs had any sum of money available for the purpose of paying sanctions to United and the other defendants on April 7, or any other given date, seems obvious. Appellee's reliance upon evidence of this character is actually an admission of the weakness of its argument.

Finally, Appellee refers to certain statements and conduct of Appellant's counsel, including the transmission of a check to United's counsel drawn on the account of McKenna & Fitting in the sum of the sanctions the day before the sanctions were due, and the District Court's approval of settlements with other defendants after which Perovich and the other plaintiffs were to receive certain sums of money [Appellee's Brief, pages 24-27].

However they may appear superficially, there is nothing in these facts which refutes Appellant's contention that the necessary funds were unavailable to it on the April 7 due date.

So far as the statements by Appellant's counsel, Mr. Weinstein, are concerned, they are in no way inconsistent with Appellant's contention that they did not have the funds available to pay the sanctions on the April 7 due date. It is true that Appellant indicated other reasons for not paying the sanctions as well. Appellant always made it clear to the court that Appellant was in a difficult financial position and might fail to pay the sanctions for that reason:

"My clients, as your honor knows from the affidavit, are practically destitute.^{10/}

* * *

". . . it is not fair to make our clients take the food out of their children's mouths, which is exactly what they are doing [by paying the sanctions] in order to avoid a double barrel.

* * *

". . . Perovich, I don't want him to spend and incur obligations which frankly he does not have the wherewithal to pay. Mr. Perovich doesn't have the money. He is all tapped out, as he puts it. . ."

[R.T. 4/6/67, afternoon, page 51, line 25 to page 52, line 1; page 53, lines 3-5; page 53, line 25 to page 54, line 3].

So far as the check from Appellant's counsel is concerned, Appellant explained in documents filed before the trial court:

"As the affidavit of W. Z. Jefferson Brown discloses, the transmittal of a check from plaintiffs' attorneys to defendant's attorneys on April 6, 1967 in the amount of \$656.15 was a clerical inadvertence. Plaintiffs' attorneys had not received those funds from the plaintiffs and the check had been prepared

The affidavit referred to is set forth in pertinent part page 18, supra.

on April 6, 1967 in the event that funds to pay the sanctions were received from the plaintiffs or any other unforeseen event thereafter occurring which would cause the sanctions to be paid by plaintiffs' attorneys." [C.T. 3905, lines 8-15].

affidavit referred to states: .

"3. On April 6, 1967, at which time I was in attendance at the Court's hearing on the above-captioned case in San Francisco, I telephoned the offices of McKenna & Fitting and instructed the bookkeeper to prepare a check in the amount of \$656.15 payable to the law firm of Gibson, Dunn & Crutcher, which check was to be delivered only at my instruction. I did so in the anticipation that some event might occur on that date which, in our opinion, would justify our advancing the funds for them.

"4. I later learned that through a misunderstanding, the check was prepared and sent to Gibson Dunn & Crutcher almost immediately after my request that it be prepared. The check was transmitted through inadvertence since I did not instruct anyone to send the check to Gibson, Dunn & Crutcher.

"5. The aforementioned check was returned to McKenna & Fitting by Gibson, Dunn & Crutcher on April 7, 1967 at the request of McKenna & Fitting." [C.T. page 3907, lines 12 to p. 3908, line 2].

With respect to the settlement proceeds to which Appellee referred, Appellant explained:

"Despite the protestations of the defendant United, the fact is clear that on April 7, 1967, the plaintiffs did not have funds available to pay the sanctions. On April 7, 1967, settlements were in mid-stream with respect to certain other defendants which settlements were thereafter to generate sufficient cash to pay the sanctions. This fact is an irrelevancy because the plaintiffs did not as of April 7 have \$656.15 available for the payment of these sanctions. The sending of the check on April 6, 1967 by McKenna & Fitting to Gibson, Dunn & Crutcher was, as has been previously outlined, a clerical oversight which took place because plaintiffs' attorneys took precautions to prepare for the unforeseeable. The settlements by the plaintiffs with Centriline and American now having been accomplished, they have the funds to pay the sanctions if the Court and United, or the Court alone, will deem payment at the present time to be within a 'reasonable time' or nunc pro tunc compliance." [C.T. page 3934, lines 16-31].

Regardless of Appellant's financial situation, however, the fact remains that the sanctions were unlawful because of the means by which they were assessed [see Appellant's Opening Brief,

8]; and that, in any event, there was substantial compliance with the order imposing sanctions.

Appellee dismissed Appellant's objection to the imposition of sanctions by the District Court on the basis of unverified statements from defendant's counsel with the bland statement that the attorneys fees "are whatever the attorney reasonably charges his client (or as the case might be his opponent) the idea that these charges are a matter of cold facts to be determined by affidavits for cross-examination makes little sense" [Appellee's brief, page 57].

Perhaps, as Appellee suggests, the court could have simply set a "reasonable fee" and not taken any evidence at all, although since the sanctions were designed to compensate defendants for the "time, trouble and effort" to which defendants had been put in the discharge of Perovich's attorney, knowledge of specifically what that "time, trouble and effort" consisted of would appear to be essential [R.T. 1/17/67, page 174, lines 23-24]. But when the court does take evidence, and sets sanctions at an amount which corresponds precisely with the amount claimed by the party so that it is apparent that the court based its award on the evidence, that evidence must be proper.

With respect to the matter of compliance, only eighteen days after the due date Appellant did offer to pay the sanctions. Nothing had happened during the interim between April 7 and April 15 to indicate that the sanctions would be less adequate compensation to United for the "time, trouble and effort" caused by

ovich's discharge of his attorney, if paid on April 25 than
paid on April 7.^{11/}

It is true, as Appellee states, that the offer was conditioned upon the granting of an additional extension of time in which to file the trial brief. But that, Appellant submits, does not nullify its effect. If this Court decides that the District Court acted properly in dismissing the action because of Appellant's failure to file a trial brief, the question of whether the non-payment of sanctions justified dismissal is, of course, moot. If the court decides that dismissal for failure to file a trial brief was an abuse of discretion, it would be sheer sophistry to affirm the action of the District Court on the ground of non-payment of sanctions because Appellant conditioned his offer of compliance upon being given an opportunity to continue to prosecute the action.

Appellee's statement that Appellant "seems to believe that it is an error to impose sanctions for an action that does not itself warrant dismissal" [Appellee's Brief, page 55] is incorrect. Appellant recognizes that a court has the power to impose sanctions as an alternative to the penalty of dismissal. It is simply that Appellant does not believe that the imposition of any penalty was appropriate under the circumstances.

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APPELLEE MISCONCEIVES THE NATURE AND EFFECT OF APPELLANT'S MOTION TO AMEND THE COMPLAINT, MODIFY THE PROTECTIVE ORDER, AND OBTAIN MODIFICATION AND/OR CLARIFICATION OF CERTAIN DISCOVERY PROCEEDINGS.

Appellee argues that "[u]nless the plaintiff can show that the lower court abused its discretion in (1) ordering payment of sanctions and (2) failing to give more time in the pretrial [sic] brief,... there should be no reversal even if the trial court erred, as alleged, in ruling on any of the collateral motions" [Appellee's Brief, p. 58].^{12/}

What Appellee fails to realize, however, is that this kind of an argument begs the question. The point to which Appellee is apparently oblivious is that whether or not the District Court did abuse its discretion cannot be determined without considering the effect of the motions.

If, as Appellant contends, the District Court erred in denying the motions -- motions which related directly to the preparation and content of the trial brief -- it is obvious that the District Court was required to give Appellant additional time to file the trial brief; the District Court itself admitted

2/ With respect to sanctions, of course, "the ultimate issue is not whether the District Court abused its discretion in ordering payment of sanctions", as Appellee alleges, but in ordering the case dismissed for non-payment of sanctions. The distinction is an important one, since this Court could find that the sanctions were properly imposed but that nevertheless it was error for the District Court not to permit them to be paid eighteen days late.

much [See Appellant's Opening Brief, pages 29-30].

But even if the District Court did not err in denying the motions, the motions still would be relevant because the plaintiff's intent is always a crucial factor in determining whether dismissal is appropriate. Appellant submits that its right to the relief sought was, at the least, arguable; that the motions were made not for the purpose of obstruction or delay but to advance the case; that if the motions were granted it would have required the granting of an extension to file the trial brief; and that under the circumstances it was an abuse of discretion for the District Court not to at least grant Appellant an extension equal to the time reasonably required for the preparation of the motions.

V

CONCLUSION

Appellant Batris W. Perovich has traveled a long and difficult road in the course of prosecuting this litigation. His investment in it -- in terms of time, money, and, perhaps most important of all, emotional commitment -- is a large one.

It may well be that everything that he has done is futile -- that upon an ultimate adjudication he will be unable to prove his case and that everything which he has invested will be lost. Perovich knows of this risk and he accepts it.

It is a far different thing, however, to deprive him of the opportunity to prove his case.

Every case which is dismissed with prejudice on a

procedural ground represents, in some sense, a failure of the judicial process. Sometimes it is unavoidable because the orderly administration of justice requires it. Usually, it is not.

Perovich should have his day in court.

Respectfully submitted,

MCKENNA & FITTING

LES J. WEINSTEIN
AARON M. PECK

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

I, ANN M. GOODWINN, being first duly sworn, depose and say:

I am a citizen of the United States of America, and a resident of the county aforesaid; I am over the age of eighteen years, and not a party to the within-entitled action; my business address is 427 West Fifth Street, Los Angeles, California 90013.

On April 24, 1969, I served the within APPELLANT'S REPLY BRIEF on the Appellee herein by placing two true copies thereof, enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Gibson, Dunn & Crutcher
John J. Hansen, Esq.
Robert E. Cooper, Esq.
Douglas M. Hindley, Esq.
634 South Spring Street
Los Angeles, California 90014

Ann M. Goodwin

SUBSCRIBED AND SWORN to before me

this 24th day of April, 1969.

Notary Public in and for said County
and State

